Supreme Court, U.S.
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In The

Supreme Court of the United States

DANE INVESTMENTS, L.L.C.,

Petitioner,

v.

H & R BLOCK FINANCIAL ADVISORS, INC.,
formerly known as Olde Discount Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSEPH F. MYERS
514 E. Lockwood Street
Covington, Louisiana 70433
Telephone: 985-809-2140
Facsimile: 985-809-0272

Counsel for Dane Investments, L.L.C.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The U.S. District Court for the Eastern District of Louisiana vacated the arbitration award on the ground that the "unconscionable results" in the case demonstrated that the respondent breached a fiduciary duty to petitioner insofar as the margin interest and brokerage fees were concerned (App. 6). Then the District Court reversed its decision and granted respondent's Motion for Reconsideration because the Fifth Circuit Court of Appeals allows only one non-statutory ground for vacating arbitration awards, the ground of "manifest disregard of the law" (App. 4). The Fifth Circuit Court of Appeals affirmed (App. 1). The Fifth Circuit Court of Appeals' decision not only conflicts with decisions of other federal courts of appeals, but the courts are in disarray on what non-statutory grounds can be used. Guidance is needed or the conflict is going to be difficult for the securities industry and public investors to live with.

The questions presented are:

1. Whether "manifest disregard of the law" is the only acceptable non-statutory ground for federal courts to use in vacating National Association of Securities Dealers ("NASD") public investor arbitration awards or are other non-statutory grounds, such as "unconscionable results" acceptable as independent grounds for vacatur, and if not, are the other non-statutory grounds used by the various circuit courts different ways of saying that there has been "manifest disregard of the law (and/or rules)."

2. Whether a U.S. Securities and Exchange Commission ("SEC") release of an enforcement proceeding and consent

QUESTIONS PRESENTED – Continued

decree that was directed at respondent for actions and transactions and alleged securities violations that took place while the petitioner did business with the respondent and that the petitioner complained of in his NASD arbitration proceeding as having happened to him, and for which the SEC issued cease-and-desist orders, should be admissible in a NASD arbitration hearing and be treated as law and/or have some probative value.

3. Whether the failure of an arbitration panel to make an audible tape recording or other useable recording or transcript of a NASD arbitration proceeding, in contravention of NASD Uniform Code of Arbitration rules, denies the claimant his constitutional rights to due process and trial by jury since no useable record of the arbitration proceeding is created and made available for judicial review.

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The NASD arbitration panel did not issue a written opinion. The results of the arbitration award were reported as *Dane Investment, L.L.C. v. H&R Block Financial Advisors, Inc.*, Case Number 02-07739, April 2, 2004, reproduced at App. 9. The U.S. District Court (E.D. Louisiana) Civil Action No. 04-2080, order and opinion entered on November 17, 2004, was not reported but is reproduced at App. 6. The U.S. District Court (E.D. Louisiana), Civil Action No. 04-2080, order and opinion entered on March 30, 2006, was not reported but is reproduced at App. 4. The Fifth Circuit Court of Appeals, Case No. 05-30414, opinion, filed on October 19, 2006, was not published but is reproduced at App. 1.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Opinion of the Fifth Circuit Court of Appeals was rendered on October 19, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Seventh Amendment to the United States Constitution provides in relevant part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

ADMINISTRATIVE DECISIONS

U.S. Securities and Exchange Commission
Administrative Proceeding File No. 3-9699
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Releases No. 7577 and No. 40423
Reproduced at App. 9.

STATUTES AND RULES

NASD Uniform Code of Arbitration 10326.
Record of Proceedings

(a) A verbatim record by stenographic reporter or a tape, digital, or other recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

(b) A verbatim record of mediation conducted pursuant to the Rule 10400 Series shall not be kept.

STATEMENT OF THE CASE

On December 22, 2002, petitioner filed an arbitration claim with the NASD against H&R Block Financial Advisors, Inc., formerly know as Olde Discount Corporation ("Olde"), because petitioner was charged nearly $800,000 in margin interest and brokerage fees for financial planning and transactions that lost nearly all of petitioner's money (nearly $800,000 in equity and the appreciation of his bank stock, totaling approximately $2 million).

Arbitration was required by the broker in its open account form. On April 2, 2004, the arbitration panel denied the claim and dismissed the proceedings. On June 25, 2004, petitioner filed a Motion to Vacate in the Civil District Court for the Parish of Orleans, State of Louisiana, Docket No. 04-09339. The case was removed to the U.S. District Court for the Eastern District of Louisiana, Civil Action No. 04-2080, on July 23, 2004 on the basis of diversity of citizenship. After briefing and oral argument, on November 17, 2004, the U.S. District Court rendered judgment vacating the arbitration award as Olde unconscionably breached its fiduciary duty in charging excessive margin interest and brokerage fees. The respondent, Olde, filed a Motion for Reconsideration on December 3, 2004. The reconsideration motion was argued on March 2, 2005 and judgment was rendered on March 30, 2005, granting the Motion for Reconsideration. This decision was appealed to the Fifth Circuit Court of Appeals and after oral argument the Court of Appeals filed judgment on October 19, 2006, affirming the U.S. District Court's decision to grant the Motion for Reconsideration.

Gregory D. Wilt formed the petitioner, Dane Investments L.L.C., to hold his condominium rental income

investments. He also had his securities investments held by petitioner. Gregory D. Wilt is 61 years old. He was born on January 1, 1946. He finished high school in 1964 and attended college for only two years. He was self-employed for twenty-two years in the sales of advertising space. He is now unemployed due to physical ailments and is living on public assistance in West Virginia since he lost his home and condominiums in Hurricane Katrina. He does not now have and has never had a computer nor a fax machine nor access to the Internet and has always lived conservatively.

Over the course of his employment, he began saving money, with a view towards retirement. He opened an account with Fidelity Investments and, although margin was used, he traded passively in a banking stock (Hibernia) and some mutual funds. (Buying, not buying and selling.)

In the fall of 1994 he was cold-called by a Houston, Texas Olde stockbroker and convinced to change his investment account over to Olde Discount Corporation. Mr. Wilt made all of his investments through his limited liability company named Dane Investments. Defacto control of the account rested with the brokers at Olde Discount Corporation/H&R Block Financial Advisors Inc. because Mr. Wilt traveled extensively and constantly and, therefore, there was limited communication. The Olde's employees recommended that Mr. Wilt agree to have "speculation" checked as an additional objective just in case the broker found one or two good prospects to try out as a very small percent of the account. Unfortunately, at least five different novice brokers handled the account, and none of the brokers that succeeded the first ever made any attempt to establish risk tolerance at different levels

of wealth. No one at Olde Discount Corporation/H&R Block Financial Advisors Inc. knew the extent of claimant's assets and each of the multiple brokers recommended trades that accomplished no reasonable objective for the client and were inconsistent with his financial resources and needs.

The trading regime completely changed when the account was moved from Fidelity to Olde Discount Corporation/H&R Block Financial Advisors Inc. No aggressive investment posture on a few trades would excuse the broker recommended and initiated trades that were inconsistent with Mr. Wilt's income and financial resources. No investment model would follow the portfolio initiated by Olde Discount Corporation/H&R Block Financial Advisors Inc. and, to the contrary, as the over concentrated high tech stocks were collapsing, Olde/H&R Block should have but failed to make a reasonable inquiry into the contemporaneous risk tolerance of petitioner. Instead, after the value of his account had dropped dramatically, Olde/H&R Block dictated the wording of and pressured Mr. Wilt into writing and signing a letter addressed to Olde/H&R Block wherein he acknowledged that he knew that he was assuming great risk and that he accepted any and all results. Olde/H&R Block threatened Mr. Wilt that if he did not write and send the letter, Olde/H&R Block would not help him recover his losses. Olde/H&R Block applied this pressure at a time when Mr. Wilt was emotionally distraught over the impending death of his mother and brother.

Olde/H&R Block urged claimant to cover margin calls from his conservative bank stock and, as such, even his historical conservative investments were put at risk and lost. Even a levered, volatile market portfolio would have

increased in value from January 1995 to the present, but claimant did not have the benefit of even elementary diversification. As a result of the multiple novice brokers, lack of supervision, failure to follow any generalized portfolio benchmark, and completely changing claimant's prior investment history, all of his money was lost.

Of course, Olde did not advise Mr. Wilt at the time he was cold-called that they were under investigation by the SEC for these very same predatory Practices (please see App. 18). In fact, Olde was ordered to cease and desist from using ill-trained novice brokers to pressure customers to buy certain select stocks that Olde was a principal or owner of the stock. The broker compensation scheme was such that the broker was forced to sell these "select" stocks in order to make any money. Of course, the result was catastrophic for Mr. Wilt. His bank stock, which had risen to a worth of over two million dollars, was converted to an over-concentration of high tech stocks. Since the portfolio was on margin, it became a disaster, and Mr. Wilt lost all of his money at age 56.

Of course, Olde did not lose. Olde charged Dane Investments and therefore Mr. Wilt over $700,000.00 in margin interest alone, while Mr. Wilt lost $800,000.00 in equity plus all of the appreciation of his Hibernia Bank stock, or $2,000,000.00.

The arbitrators did not make an audible recording of the hearing so there was no transcript of the hearing, and consequently no record for judicial review, although attempts were made by the petitioner to transcribe the tapes.

The arbitrators failed to even address one of the central causes of action in the case – breach of fiduciary

duty. They also manifestly disregarded the SEC investigation, analysis, and cease and desist order, although it was in the record for their review.

The arbitrators imperfectly performed their duties in not awarding damages and compensating the petitioner for such predatory practices, which resulted in Olde making almost $800,000.00 in order to lose all of Mr. Wilt's liquid net worth and retirement. That result was unconscionable.

The petitioner filed a motion to vacate the arbitration award of zero (though all costs of the arbitration hearing were charged to the respondent). The motion was heard by the U.S. District Court for the Eastern District of Louisiana. The court granted the motion on the stated ground of "unconscionable results" (App. 6).

The respondent filed a motion for reconsideration and the district court reversed itself and granted the motion for reconsideration, citing cases that held that "manifest disregard of the law" is the only non-statutory ground for vacating a securities arbitration award in the Fifth Circuit (App. 4). The court had this to say about its decision to reverse:

> Yet the frustration lingers. It will, I believe, be a permanent, fixed reaction to these kinds of arbitrated results. All who are involved in the decision-making process of the arbitration are aware that the matter at hand must be brought to a final conclusion. The arbitrators themselves are fully cognizant that the overriding consideration is "get it resolved." This usually requires some very close calls – many or all of which may be poorly sorted out. Conclusions are often shakily arrived at and handed down with little continuity . . . So, at this point, there is nothing left to do but accept the

> result and send it up the line. As it goes up the line, it gets to wear the same protective coating worn by the most carefully and painstakingly-considered result. It is essentially sanitized by courts who are more committed to protecting the arbitration process than assuring an absolutely fair result. So be it. As long as we realize that this is what we are doing (App. 5).

The Fifth Circuit Court of Appeals affirmed the reversal and accepted and used the arguments of the respondent to express its opinion, even though there was no record of the arbitration proceeding for judicial review (App. 1).

This petition should be granted and the matter remanded to the District Court or to the NASD for the reasons set out herein.

SUMMARY OF ARGUMENT

The Court of Appeals should have upheld the District Court's decision in the first instance to vacate the NASD arbitration award on the ground of "unconscionable results." Since the Court has not defined "manifest disregard of the law" and the appellate courts have adopted and use various formulations and varied and conflicting non-statutory grounds for vacating an arbitration award and the courts have not provided clear tests for determining the applicability and reasonableness of those varying non-statutory grounds, the non-statutory ground applied by the district court in the first instance, in this case, in its prudent judicial discretion, should have been sufficient to vacate the award.

"Unconscionable results," "contrary to public policy," "arbitrary and capricious," "significant injustice," "denial of a fundamentally fair hearing," and "completely irrational," if not independent grounds for vacating an arbitration award, are acceptable, alternative formulations of a statutory ground or of the accepted concept and ground of "manifest disregard of the law," and as such are acceptable grounds for vacating a securities arbitration award.

The arbitration panel should have regarded an SEC release of an enforcement order and consent decree against respondent for violations petitioner complained of as "law" and/or as evidence or proof that respondent was committing such violations at the time complained of and was ordered to cease and desist such actions and violations.

A verbatim record of the arbitration proceeding is statutorily required by Rule 10326 of the NASD Uniform Code of Arbitration. No audible or otherwise useable recording was made. This failure is a recurring occurrence in NASD arbitration proceedings. The failure to make a useable recording denied petitioner a record for judicial review and, as a result, denied petitioner his constitutional rights to due process and trial by jury.

ARGUMENT

I. THE COURT OF APPEALS SHOULD HAVE UPHELD THE DISTRICT COURT'S ORIGINAL DECISION TO VACATE THE NASD ARBITRATION AWARD ON THE GROUND OF "UNCONSCIONABLE RESULTS."

A. The district court felt that the actions of the respondent, in charging almost $800,000 to lose almost all of petitioner's assets, were unconscionable and vacated the arbitration award of zero (App. 6). However, on rehearing, the district court felt compelled to place form over substance (the Fifth Circuit Court of Appeals does not recognize "unconscionable results" as an independent, non-statutory ground for vacating an award) and reversed its prior judgment (App. 4). The district court clearly expressed its frustration at feeling technically restrained from correcting what it considered an injustice:

> Yet the frustration lingers. It will, I believe, be a permanent, fixed reaction to these kinds of arbitrated results. All who are involved in the decision-making process of the arbitration are aware that the matter at hand must be brought to a final conclusion. The arbitrators themselves are fully cognizant that the overriding consideration is, "get it resolved." This usually requires some very close calls – many or all of which may be poorly sorted out. Conclusions are often shakily arrived at and handed down with little continuity. . . . So at this point, there is nothing left to do but accept the result and send it up the line. As it goes up the line, it gets to wear the same protective coating worn by the most carefully and painstakingly-considered result. It is essentially sanitized by courts who are more committed to protecting the arbitration process than assuring an absolutely

> fair result. So be it. As long as we realize that this is what we are doing (App. 5).

The court of appeals affirmed the reversal decision.

This Court, in Justice Blackmun's dissenting opinion in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 260 (1987), said that "judicial review is still substantially limited to the four grounds listed in 10 of the Arbitration Act and to the concept of 'manifest disregard of the law.'" However, Justice Blackmun, in that same paragraph, cited a Third Circuit case, *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, 1131 (CA3 1972) and described the decision in parenthesis: "(an arbitrator's decision must be upheld unless it is 'completely irrational')."

The statutory scheme provides that arbitration awards can be vacated where arbitrators exceeded their authority or imperfectly executed their powers, or any misbehavior by which the rights of the parties have been prejudiced. 9 U.S.C. § 10.

The Fifth Circuit Court of Appeals has recognized at least three non-statutory grounds for vacatur of arbitration awards in Labor Management Relations Act and Federal Arbitration Act cases: (1) Award contrary to public policy; (2) Arbitrary and capricious; and (3) Awards failure to draw its essence from underlying contract. *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999).

The Fifth Circuit apparently recognizes only one non-statutory ground for vacating securities arbitration awards, the ground of "manifest disregard of the law." *Braham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385 (5th Cir. 2004). In footnote number 6 the court in *Braham, id.*, said:

The other circuits are in disarray on this question. *George Watts & Son v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (recounting confusion in the Seventh Circuit and commenting that "[t]he law in other circuits is similarly confused, doubtless because the Supreme Court has been opaque"). The Eleventh Circuit has accepted that an award may be vacated as arbitrary and capricious. *See Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 435 (11th Cir. 1995). The Eleventh Circuit, however, stands alone. *See* Larry E. Edmondson, 1 Domke on Commercial Arbitration § 39:10 (3d ed. 2003) (characterizing the idea that an award may be vacated as arbitrary and capricious as a "construct of the Eleventh Circuit).

The Fourth, Seventh, and Tenth Circuits have implicitly rejected the Eleventh Circuit's position by enunciating accepted grounds for vacatur and rejecting all others. *See, e.g., Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001); *IDS Life Ins. Co. v. Royal Alliance Assocs.*, 266 F.3d 645, 650 (7th Cir. 2001); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998). (However, these three circuits do not agree on what those accepted nonstatutory grounds for vacatur are. The Fourth Circuit accepts only manifest disregard. *Apex*, 142 F.3d at 193. The Seventh Circuit accepts only a limited version of manifest disregard. *See IDS*, 266 F.3d at 650. The Tenth Circuit accepts manifest disregard, violation of public policy, and denial of a fundamentally fair hearing. *See Sheldon*, 269 F.3d at 1206.)

The First, Second, and D.C. Circuits have neither accepted nor rejected arbitrariness and capriciousness but have emphasized that vacatur is available only in very limited circumstances. *See,*

e.g., Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 27 (2d Cir. 2000); *Morani v. Landenberger,* 196 F.3d 9, 11 (1st Cir. 1999); *Al-Harbi v. Citibank, N.A.,* 85 F.3d 680, 682 (D.C. Cir. 1996).

The Third, Eighth, and Ninth Circuits have recognized that an award may be vacated as completely irrational. *See, e.g., Schoch v. InfoUSA, Inc.,* 341 F.3d 785, 788 (8th Cir. 2003), *cert. denied,* ___ U.S. ___, 124 S.Ct. 1414, 158 L.Ed. 2d 81 (2004); *G.C. & K.B. Invs. v. Wilson,* 326 F.3d 1096, 1105 (9th Cir. 2003), *cert. dismissed,* ___ U.S. ___, 124 S.Ct. 980, 157 L.Ed. 2d 810 (2004); *Roadway Package Sys., Inc. v. Kayser,* 257 F.3d 287, 292 n. 2 (3d Cir. 2001). This test is "similar in nature in thrust to the 'arbitrary and capricious' test of the Eleventh Circuit." 1 Domke, *supra,* § 39:11. Some cases from these Circuits, however, suggest that "complete irrationality" is simply a subset of a statutory ground for vacatur. *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Servs.,* 341 F.3d 987, 997 (9th Cir. 2003) (en banc) ("We have held that arbitrators 'exceed their powers' [under section 10(a)(4) of the FAA] not when they merely interpret or apply the governing law incorrectly, but when the award is 'completely irrational' or exhibits 'manifest disregard of law.'") (internal citations omitted); *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.,* 868 F.2d 52, 56 (3d Cir. 1989) (considering in context of challenge under § 10(a)(4) whether award was completely irrational).

What is important and critical in petitioner's case and for investors across this nation is that the standards for judicial review of securities' arbitration awards be clear and not vague.

Investors are giving up important rights in mandatory arbitration, in proceedings conducted by the industry against which those investors have claims and grievances. Clear and fair judicial review is essential to the protection of those rights. The conflict among the circuits should be resolved and this Court should provide clear and fair criteria or a clear and fair test for determining the reasonableness of the varying non-statutory grounds.

Since the grounds for vacating a securities arbitration award vary among the circuits and since there are no judicial standards for judging the appropriateness and correctness of the varying grounds, this case should be remanded on grounds that the District Court's original decision to grant the petitioner's motion to vacate was founded on reasonable grounds when the court exercised its judicial discretion in good faith.

B. The Fifth Circuit Court of Appeals stated in *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999) that "the concept of 'manifest disregard of the law' has not been defined by the Supreme Court. The circuits have adopted various formulations." The Williams court adopted the following formulation:

> First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld. Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge

> norms appropriate to the relations between the parties.

Some cases from some of the circuits have suggested that at least one of the non-statutory grounds, "complete irrationality," is simply a subset of a statutory ground for vacatur. *Braham, supra*. Petitioner suggests that most, if not all, of the non-statutory grounds, including "unconscionable results," "contrary to public policy," "arbitrary and capricious," "failure to draw its essence from underlying contract," "significant injustice," "denial of a fundamentally fair hearing," and "completely irrational" may be subsets of a statutory ground or if not, a subset of "manifest disregard of the law." As such, they are acceptable grounds for vacating a securities arbitration award.

II. THE ARBITRATION PANEL SHOULD HAVE REGARDED AN SEC RELEASE OF AN ENFORCEMENT ORDER AND CONSENT DECREE AGAINST RESPONDENT FOR VIOLATIONS PETITIONER COMPLAINED OF AS "LAW" AND/OR AS EVIDENCE OR PROOF THAT RESPONDENT WAS COMMITTING SUCH VIOLATIONS AT THAT TIME COMPLAINED OF AND WAS ORDERED TO CEASE AND DESIST SUCH ACTIONS AND VIOLATIONS.

The Securities and Exchange Commission's ("SEC") factual findings, opinions, and conclusions are admissible. *Option Resource Group v. Chambers Development Company, Inc.*, CA 93-0354, 967 F. Supp. 846, 849 (W.D. Pa. 1996). Further, in this case before the Court, the wrongs sanctioned and ordered to cease and desist occurred during the very same time frame when the petitioner was solicited by the respondent. The petitioner was solicited to

move over to the respondent in 1994, and the conduct sanctioned occurred from the fall of 1992 to August 1995 (App. 18). The sanctioned conduct was ordered not to continue, but it did.

The respondent argued in the arbitration proceeding and the courts below and quoted from the SEC release that "the findings . . . are not binding on any other person or entity in this or any other proceeding."

The person who was named and bound by the SEC order was the respondent (App. 18). The actions and violations, that were described, were perpetrated on respondent's clients, one of whom was the petitioner. The petitioner was neither named nor excluded. There were sixteen examples, but they were not exhaustive. The violations cited by the SEC were the same as what happened to the petitioner and the same that he presented in the arbitration proceedings and the courts below.

The respondent cited a case for the proposition that consent decrees should not be admitted into evidence. *Kramas v. Security Gas & Oil, Inc.*, 672 F.2d 766, 771 (9th Cir. 1980). However, that case can be distinguished because it held that:

> It was not reversible error for the trial court to refuse to admit evidence of a consent decree entered in a prior SEC enforcement proceeding against Miller, SEGO, and other persons offered under Federal Rule of Evidence 404(b). The consent decree involved no finding of culpability and no judgment of wrongdoing, and contained a recitation it did not constitute evidence of wrongdoing in the enforcement proceeding or in any other proceeding. Moreover, whether the danger of prejudice from admission of evidence of other

> wrongful acts – the decree or direct evidence of the alleged wrongful conduct – outweighed its probative value was committed to the trial court's sound discretion . . . In this instance, the probative value of the evidence was limited – it related to different transactions and alleged misrepresentations of a different kind – while the prejudicial impact of the evidence upon the jury was obviously substantial. Moreover, the admission of the evidence would have opened large areas of proof on collateral matters. The district court could reasonably conclude that the balance favored exclusion.

The respondent also cited *Beatrice Foods v. FTC,* 540 F.2d 303, 312 (7th Cir. 1976) for the proposition that a consent decree is not controlling precedent for a later action. The petitioner's claims do not relate to a later action. The petitioner brought a claim for actions that occurred at the time of the actions recited and for the very same actions recounted in the SEC consent decree.

The respondent instructed the arbitration panel not to consider the subject SEC release and consent decree and also instructed the courts below that the decree should not have been considered by the arbitration panel.

The Court of Appeals in this case said that the consent order was not enforceable by the arbitration panel. The petitioner did not ask the arbitration panel to "enforce" the order. Enforcement is the responsibility of the SEC. However, the SEC does have oversight authority over the arbitration procedures of the NASD. In fact, this Court's acceptance, in *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987), of mandatory arbitration was primarily based upon this Court's belief in the SEC's representation that its oversight of the Self-Regulatory

Organizations (SROs), such as the NASD, ensures the adequacy of arbitration. *id.*, at 250. The petitioner asked the arbitration panel to treat the consent decree as a legal finding of wrongdoing and as supporting evidence in the arbitration proceeding.

Since the SEC has oversight of SROs and their arbitration procedures, SEC consent orders must have some legal import and probative value in a NASD arbitration proceeding involving one or more of the same parties that are named in the consent order and involving similar subject matter and transactions occurring in the relevant time period. For the arbitration panel to refuse to admit and/or to consider such consent orders should be a statutory violation and/or "manifest disregard of the law" justifying *vacatur.*

III. A VERBATIM RECORD OF THE ARBITRATION PROCEEDING IS STATUTORILY REQUIRED BY RULE 10326 OF THE NASD UNIFORM CODE OF ARBITRATION. NO AUDIBLE OR OTHERWISE USEABLE RECORDING WAS MADE. THIS FAILURE IS A RECURRING OCCURRENCE IN NASD ARBITRATION PROCEEDINGS. THE FAILURE TO MAKE A USEABLE RECORDING DENIED PETITIONER A RECORD FOR JUDICIAL REVIEW AND, AS A RESULT, DENIED PETITIONER HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TRIAL BY JURY.

This Court has approved mandatory arbitration for securities conflicts even though investors have forfeited their right to a jury trial because this Court believes that judicial review of the arbitration proceeding affords

investors a minimum of due process. *Shearson/American Express*, *supra*, at 232; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed. 2d 26 (1991). The petitioner disagrees that there is a minimum of due process in cases where the arbitration panel fails to make an audible, useable recording or transcript of the proceeding because in those cases there is no record for the courts to review and the investor is put in the position of having to prove what happened at the proceeding and to refute what the respondent alleges. This places an undue burden on the investor and deprives him of his property without a minimum of due process.

It is true that arbitrators do not have an obligation to provide an opinion of their findings. However, the NASD requires that arbitrators provide a useable record of the proceeding. This was not always a requirement, but was enacted to ensure claimants' their right to fair and just judicial review.

The respondent alleged in proceedings below that a U.S. district court rejected argument that poor quality of NASD recording constituted statutory grounds for *vacatur*. *Grosso v. Barney*, 2000 WL 22657305 at *7 (E.D. Pa. Oct. 24, 2003). With all due respect, that is not what the court held in *Grosso*. The court in *Grosso* held that "the arbitrators' failure to record approximately two and a half hours of testimony over the course of five days does not constitute misconduct within the meaning of 9 U.S.C. § 10(a)(3)."

In the petitioner's case, the arbitrators failed to make an audible or useable recording of the entire proceeding. The petitioner tried to have a court reporter transcribe the tapes, but the court reporter could not do so.

The respondent also cited *Perna v. Barbieri*, No. CIV. 97-5943, 1998 WL 181818, at *2 (E.D. Pa. Apr. 16, 1998), *affd.*, 176 F.3d 472 (3d Cir. 1999) wherein the court rejected argument that NASD tape recording was of such poor quality as to frustrate plaintiff's efforts to review proceedings and amounted to "undue means" within the meaning of 9 U.S.C. § 10(a)(1).

Petitioner is not bringing an action for "undue means" within the meaning of 9 U.S.C. § 10(a)(1) but, instead, for being deprived of due process and his right to trial by jury. The failure of the arbitration panel to provide a useable recording, as required by NASD rules, deprived petitioner of a record upon which a prudential judicial review could be made and thereby deprived petitioner of his constitutional rights to due process and a trial by jury.

CONCLUSION

This petition should be granted and the judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

JOSEPH F. MYERS (No. 09868)
514 E. Lockwood Street
Covington, Louisiana 70433
Telephone: 985-809-2140
Facsimile: 985-809-0272

Counsel for Dane Investments, L.L.C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30414

DANE INVESTMENTS, LLC,

Plaintiff-Appellant,

versus

H & R BLOCK FINANCIAL ADVISORS, INC.,
formerly known as Olde Discount Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:04-CV-2080

(Filed Oct. 19, 2006)

Before JOLLY, DAVIS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

In this appeal Dane Investments ("Dane") seeks to vacate an arbitration award in favor of its stockbroker, H & R Block Financial Advisors, formerly the Olde Discount Corporation ("Olde"). Vacatur is an especially steep hill to climb given our deference to arbitration awards. Here we are satisfied that there are no grounds for holding that the

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

arbitration panel exceeded its authority or that it manifestly disregarded relevant law in making the award.

We also reject Dane's argument that the panel failed to "enforce" an SEC consent order with Olde. Although the panel probably should not have even admitted the consent order into evidence (it certainly was not "enforceable" by the panel), the panel nevertheless admitted and considered it. We further reject the contention that the panel improperly ignored Dane's breach of fiduciary duty claim; although the admittedly terse award made no specific reference to the claim, there is no basis to say it was not considered, and the award explicitly denied any and all claims it did not address specifically. Dane's third argument, that the panel manifestly disregarded National Association of Securities Dealers rules and its own compliance standards in selling Dane unsuitable stocks, is meritless because Dane was an aware, sophisticated, and particularly aggressive investor; further, it is well-established such rules and standards do not provide a private cause of action. Because there is no basis to show what law the panel applied, Dane's argument that it somehow improperly drew upon Michigan law in its decision is without merit. Finally, Dane's contention that the arbitration clause in its agreement with Olde is unconscionable and void is foreclosed because Dane voluntarily brought its claims before the panel and it may not revisit that decision now, having received an adverse judgment.

The decision of the district court denying Dane's motion to vacate the arbitration award is therefore

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30414

D.C. Docket No. 2:04-CV-2080

DANE INVESTMENTS LLC

Plaintiff-Appellant

v.

H & R FINANCIAL ADVISORS, INC,
formerly known as Olde Discount Corporation

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans.

Before JOLLY, DAVIS, and BENAVIDES, Circuit Judges.

JUDGMENT

(Filed Oct. 19, 2006)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: NOV 10 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANE INVESTMENT, L.L.C.	CIVIL ACTION NO. 04-2080
VERSUS	
H&R BLOCK FINANCIAL ADVISORS, INC., formerly OLDE DISCOUNT CORP.	SECTION M

ORDER

(Filed Mar. 30, 2005)

Before the Court is defendant's Motion for Reconsideration, which was opposed by plaintiff, and which came for hearing on March 2, 2005, with oral argument. Defendant seeks reconsideration of this Court's Order entered November 18, 2004, granting plaintiff's Motion to Vacate the Arbitration Award.

Upon review of the facts as presented by counsel from both sides[1] and the Fifth Circuit's established standard for vacating arbitration awards, this Court must reconsider its order of vacatur and uphold the award. *See Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385 (5th Cir. 2004), *and perhaps even more compelling, note Berk-Cohen Associates, L.L.C. v. Orkin Exterminating Co.* 264 F.Supp.2d 488, *especially Judge Fallon's conclusionary observations regarding the "latest word" from the Louisiana Supreme Court. Id. at 459.*

[1] The three-person arbitration panel conducted a three-day hearing in which both Dane Investments and Olde presented extensive evidence. Tapes of the hearing were not able to be reviewed or transcribed.

Yet the frustration lingers. It will, I believe, be a permanent, fixed reaction to these kinds of arbitrated results. All who are involved in the decision-making process of the arbitration are aware that the matter at hand must be brought to a final conclusion. The arbitrators themselves are fully cognizant that the overriding consideration is, "get it resolved." This usually requires some very close calls – many or all of which may be poorly sorted out. Conclusions are often shakily arrived at and handed down with little continuity. Even so, they are honestly arrived at with a sufficient minimum of due process. The basic conditions for arbitration have, for all practical purposes, been met.

So, at this point, there is nothing left to do but accept the result and send it up the line. As it goes up the line, it gets to wear the same protective coating worn by the most carefully and painstakingly-considered result. It is essentially sanitized by courts who are more committed to protecting the arbitration process than assuring an absolutely fair result. So be it. As long as we realize that this is what we are doing.

Accordingly, Motion for Reconsideration is **GRANTED**, and the Arbitration Award is **AFFIRMED**.

New Orleans, Louisiana, this 30th day of March, 2005.

/s/ Peter Beer
Peter Beer
United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANE INVESTMENT, L.L.C.	CIVIL ACTION NO. 04-2080
VERSUS	
H&R BLOCK FINANCIAL ADVISORS, INC., formerly OLDE DISCOUNT CORPORATION	SECTION M

ORDER

(Filed Nov. 17, 2004)

Before the Court is Plaintiff's Motion to Vacate the Arbitration Award, which came for hearing on October 27, 2004, with oral argument. After consideration of the Motion, the briefs and arguments for both sides, and the applicable law, the Court grants the Motion in part.

FACTS

Plaintiff, Gregory D. Wilt, investing as Dane Investments, LLC, alleges that he was solicited by Olde Discount Corporation (Olde) to move from his large holding in Fidelity Investments and bank stocks to a large concentration in high tech stocks held by Olde and in which they made a market. Plaintiff alleges that most of the stocks were chosen by the Olde brokers who had defacto control of the account. As a result, Plaintiff alleges Olde charged him $789,561.20 in margin interest and brokerage fees while it lost all of Plaintiff's money ($700,000 in equity and the appreciation of his bank stock, totaling approximately $2 million). After binding arbitration before the National Association of Securities Dealers, Inc., (NASD), the Panel found that the Rules of Fair Practice had not

been violated and dismissed all of Plaintiff's claims with prejudice.

ANALYSIS

It is well established that the Court may vacate an arbitration award only when the Panel's decision manifestly disregards the law. *See Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d.391, 395 (5th Cir. 2003). The Fifth Circuit held recently that only manifest disregard of the law is an accepted non-statutory ground for vacatur. *See Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, (5th Cir. 2004). The Court said that we must remain exceedingly deferential to arbitration; however, if, based on the facts before the arbitrator, an award indisputably runs contrary to clearly applicable law known to the arbitrators, then the district court can vacate the award as manifestly disregarding the law. *Id.* at 385.

I believe that the unconscionable results in this particular case demonstrate that Olde breached a fiduciary duty to Plaintiff insofar as the margin interest and brokerage fees are concerned, and the Panel should not have dismissed these claims.

ACCORDINGLY, the Motion is **GRANTED in part**, as stated above, and the matter is remanded to the NASD Panel for a res nova hearing on Plaintiff's losses as a result of the margin interest and the brokerage fees.

New Orleans, Louisiana, this 17th day of November, 2004.

/s/ Peter Beer
Peter Beer
United States
District Judge

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant Dane Investments, L.L.C.	Case Number: 02-07739
Name of the Respondent H&R Block Financial Advisors, Inc.	Hearing Site: New Orleans, Louisiana

Nature of the Dispute: Customer vs. Member.

REPRESENTATION OF PARTIES

For Dane Investments, L.L.C., hereinafter referred to as "Claimant": James E. Stovall, Esq., Law Office of James E. Stovall, Covington, Louisiana.

For H&R Block Financial Advisors, Inc. ("H&R"), hereinafter referred to as "Respondent": David T. Doyle, Assistant General Counsel, H&R, Detroit, Michigan.

CASE INFORMATION

Statement of Claim filed on or about: December 20, 2002.
Claimant signed the Uniform Submission Agreement: November 30, 2002.
Statement of Answer filed by Respondent on or about: February 25, 2003.
Respondent signed the Uniform Submission Agreement: January 29, 2003.

CASE SUMMARY

Claimant asserted the following causes of action: improper use of margin; lack of diversification; lack of supervision; utilization of multiple brokers; failure to follow any generalized portfolio benchmark; complete departure from Claimant's prior investment history; violation of the Rules of Fair Practice; and over-concentration in unsuitable investments. The causes of action relate to the purchase in Claimant's account of unspecified high-tech stocks.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various defenses.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of $4,000,000.00 (including loss of original equity, benefit of the bargain damages, excessive commissions and margin interest), costs and reasonable attorney's fees.

Respondent requested that all of the claims be dismissed and that Claimant be assessed the Respondent's defense costs and expenses incurred in defending this matter.

OTHER ISSUES CONSIDERED AND DECIDED

During the evidentiary hearing, Respondent objected to the admittance into evidence of Claimant's Exhibit 19, which was overruled by the Panel.

At the conclusion of the evidentiary hearing, Respondent moved for dismissal of the claim, which was denied by the Panel.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

The Panel finds no liability on the part of Respondent for alleged violations of the Rules of Fair Practice or Claimant's allegation of overconcentration in unsuitable investments.

All of Claimant's claims are dismissed with prejudice.

Each party shall bear their own attorneys' fees.

Any and all claims for relief not specifically addressed herein are denied.

FEES

Pursuant to the NASD Code of Arbitration Procedure (the "Code"), the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= $600.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, H&R is a member firm and a party.

Member surcharge	=$2,800.00
Pre-hearing process fee	=$ 750.00
Hearing process fee	=$5,000.00
Total Member Fees	=$8,550.00

Adjournment Fees

No adjournments were requested in this matter.

Injunctive Relief Fees

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

Injunctive relief fees were not assessed in this matter.

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with the Panel @ $1,200.00/session		=$1,200.00
Pre-hearing conference:	August 14, 2003	1 session
Five (5) Hearing sessions @ $1,200.00/session		=$6,000.00
Hearing Dates:	March 9, 2004	2 sessions
	March 10, 2004	2 sessions
	March 11, 2004	1 session

Total Forum Fees =$7,200.00

The Panel has assessed the total forum fees of $7,200.00 to Respondent.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred in this matter.

Fee Summary

Claimant is solely liable for:

Initial Filing Fee	= $ 600.00
Total Fees	= $ 600.00
Less Payments	= $ 600.00
Balance Due NASD Dispute Resolution	= $ 0.00

Respondent is solely liable for:

Member Fees	= $ 8,550.00
Forum Fees	= $ 7,200.00
Total Fees	= $15,750.00
Less Payments	= $ 8,550.00
Balance Due NASD Dispute Resolution	= $ 7,200.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

James Francis Donovan	-	Public Arbitrator, Presiding Chairperson
Kendall P. Hill	-	Public Arbitrator
Sandra J. Bakalus	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ — April 1, 2004
James Francis Donovan — Signature Date
Public Arbitrator,
Presiding Chairperson

/s/ — April 1, 2004
Kendall P. Hill — Signature Date
Public Arbitrator

/s/ — April 2, 2004
Sandra J. Bakalus — Signature Date
Non-Public Arbitrator

April 2, 2004
Date of Service (For NASD Dispute Resolution office use only)

Respondent is solely liable for:

Member Fees	= $ 8,550.00
Forum Fees	= $ 7,200.00
Total Fees	= $15,750.00
Less Payments	= $ 8,550.00
Balance Due NASD Dispute Resolution	= $ 7,200.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

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Kendall P. Hill	-	Public Arbitrator
Sandra J. Bakalus	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ James Francis Donovan — April 1, 2004
James Francis Donovan — Signature Date
Public Arbitrator,
Presiding Chairperson

_____ — _____
Kendall P. Hill — Signature Date
Public Arbitrator

_____ — _____
Sandra J. Bakalus — Signature Date
Non-Public Arbitrator

_____
Date of Service (For NASD Dispute Resolution office use only)

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Kendall P. Hill	-	Public Arbitrator
Sandra J. Bakalus	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

James Francis Donovan Public Arbitrator, Presiding Chairperson	Signature Date
Kendall P. Hill Public Arbitrator	Signature Date
/s/ Sandra J. Bakalus Sandra J. Bakalus Non-Public Arbitrator	4/2/04 Signature Date

Date of Service (For NASD Dispute Resolution office use only)

Respondent is solely liable for:

Member Fees	= $ 8,550.00
Forum Fees	= $ 7,200.00
Total Fees	= $15,750.00
Less Payments	= $ 8,550.00
Balance Due NASD Dispute Resolution	= $ 7,200.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

James Francis Donovan	-	Public Arbitrator, Presiding Chairperson
Kendall P. Hill	-	Public Arbitrator
Sandra J. Bakalus	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

James Francis Donovan
Public Arbitrator,
Presiding Chairperson

Signature Date

/s/ Kendall P. Hill
Kendall P. Hill
Public Arbitrator

4/1/04
Signature Date

Sandra J. Bakalus
Non-Public Arbitrator

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

[SEAL] U.S. Securities and Exchange Commission

Administrative Proceeding File No. 3-9699
In the Matter of
Olde Discount Corp., Ernest J. Olde,
Stanley A. Snider, and Daniel D. Katzman

- **A. Respondents**
- **B. Summary**
- **C. Background**
- **D. Olde's Compensation, Production and Training Practices**
  - **1. Olde's Compensation Practices**
  - **2. Olde's Production Requirements and Position Quotas**
  - **3. Olde's Use of Sales Credits**
  - **4. Olde's Practices and Procedures Regarding RRs and Their Customers Who Failed to Effect Transactions in Special Products**
  - **5. Olde's Hiring and Training Practices Encouraged the Use of High Pressure Sales Techniques**
- **E. Specific Sales Practice Violations at Olde**

UNITED STATES OF AMERICA

Before The

SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 7577

SECURITIES EXCHANGE ACT OF 1934

Release No. 40423

ADMINISTRATIVE PROCEEDING

File No. 3-9699

ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTIONS 15(b), 19(h),

AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, IMPOSING REMEDIAL SANCTIONS AND MONETARY PENALTIES, AND ISSUING CEASE-AND-DESIST ORDERS

In the Matter of OLDE DISCOUNT CORP., ERNEST J. OLDE, STANLEY A. SNIDER, AND DANIEL D. KATZMAN

Respondents.

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b), 19(h), and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Olde Discount Corp. ("Olde"), Ernest J. Olde ("E. Olde"), Stanley A. Snider ("Snider"), and Daniel D. Katzman (collectively "the Respondents"). In anticipation of the institution of these administrative proceedings, the Respondents have submitted Offers of Settlement, which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and prior to a hearing pursuant to the Commission's Rules of Practice, 17 CFR 201.100 et seq., the Respondents, by their Offers of Settlement, admit the jurisdiction of the Commission over them and the subject matter of this administrative proceeding and consent to the entry of this Order Instituting Public Administrative Proceedings, Making Findings, Imposing Remedial Sanctions and Monetary Penalties, and Issuing Cease and Desist Orders ("Order") without admitting or denying the Commission's

findings except for those contained in Section III.A., which are admitted.

II.

Accordingly, IT IS HEREBY ORDERED that proceedings pursuant to Section 8A of the Securities Act and Sections 15(b), 19(h), and 21C of the Exchange Act be, and hereby are, instituted.

III.

On the basis of this Order and the Respondents' Offers of Settlement, the Commission finds[1] the following:

A. Respondents

Olde has been registered with the Commission as a broker-dealer since October 27, 1971 pursuant to Section, 15(b) of the Exchange Act.[2] The firm's main office is in Detroit, Michigan, and it has had as many as 197 branch offices throughout the United States. Olde is a member of all the national exchanges and the National Association of Securities Dealers, Inc. ("NASD"). The New York Stock Exchange ("NYSE") is the firm's designated examining authority.

E. Olde is the founder, chairman and majority shareholder of Olde Financial Corp. ("Olde Financial"), the parent company of Olde. At all times relevant to this proceeding, E. Olde was also a director of Olde. E. Olde served as the Olde regional manager for Florida from October 1992 until at least June 1993.

Snider was, at all times relevant to this proceeding, a director, senior vice president, the national sales manager of Olde, and a shareholder of Olde Financial.

Katzman was, at all times relevant to this proceeding, a vice president of Olde and regional manager for several of the firm's regions. Katzman was also in charge of Olde's "private brokerage" offices, which handled the accounts of the firm's wealthiest customers. Katzman became a shareholder of Olde Financial in 1994.

B. Summary

These proceedings involve sales practice violations at Olde which occurred from Fall 1992 through at least August 1995 ("the relevant period"). As a consequence of the firm's compensation, production, hiring and training practices, an environment was created at Olde in which a number of Olde registered representatives ("RRs") engaged in churning, unauthorized trading, misrepresentations and omissions of material facts, and unsuitable recommendations.

Olde policies during the relevant period included a compensation system which provided substantially higher payouts for transactions in stocks recommended by Olde – products known within Olde as "special venture" stocks. Further, the firm paid differing levels of compensation in the form of sales credits for different special venture stocks. This created a potential conflict of interest with customers that, in fact, came to fruition in certain instances. Along with establishing production requirements, Olde established a system of special venture position quotas and stated that RRs who failed to satisfy them would be dismissed. In addition, Olde maintained a policy of taking customer accounts away from an RR if the RR

did not sell at least one Olde "special product", which included various securities other than special ventures stocks, to each customer every six months.

Olde's sales force contained a number of recent college graduates with no experience in the securities industry. These inexperienced employees were hired and then underwent a training program that consisted primarily of instruction in sales techniques, including high pressure sales techniques.

Olde's compensation, production, hiring and training practices combined to create an environment in which sales practice abuses occurred. At certain offices around the country, certain Olde RRs sought to satisfy the firm's production requirements by using high pressure sales tactics to sell those special venture stocks for which the firm was paying the highest compensation at the time. In the process, certain RRs churned customer accounts, effected unauthorized and unsuitable trades, and misrepresented and omitted to disclose material facts.

Olde is liable for these violations because they occurred in an environment created by the firm's policies. Snider and Katzman implemented these policies and induced certain of the violations because they acted, at a minimum, recklessly in failing to respond adequately to certain problems brought to their attention that could be expected to and did occur given these policies. Snider and Katzman were each a cause of certain of Olde's violations due to the foregoing conduct which they knew or should have known would contribute to such violations. E. Olde failed reasonably to supervise with a view to preventing such violations because he formulated and oversaw the adoption of most of these policies; such policies made it difficult

to establish procedures and a system for applying such procedures which could have prevented the violations. E. Olde was a cause of Olde's violations due to the foregoing conduct which he knew or should have known would contribute to such violations.

C. Background

Olde was incorporated and registered with the Commission as a broker-dealer in 1971. From 1971 until 1975, the firm operated as a full-service firm. In 1975, when fixed-rate commissions were abolished, Olde became a discount broker-dealer and changed its name to the present Olde Discount Corp. From 1975 until the mid-1980s, Olde operated strictly as a discount firm. The firm offered no investment advice to its customers, and its RRs simply took their customers' orders.

In the mid-1980s, however, Olde began to expand its services beyond those of a traditional discount broker-dealer. A research department was established and analysts to staff that department were hired. Toward the end of the 1980s, Olde began making recommendations to its customers. During this time, Olde's research department continued to grow. By 1990, Olde had labeled the stocks that its research department followed and in which the firm made a market "special venture" stocks.[3]

During the relevant period, the firm's list of special venture stocks numbered approximately 200 exchange listed and NASDAQ stocks. While the list included a number of well-known, heavily traded stocks, the majority of the stocks on the list were speculative or growth investments. Olde's brochures regarding the special venture stocks stated that the firm's research department believed that

the stocks on the list provided the customer the best chance for maximum return if held between two and four years.

Olde advertises itself as "America's Only Full-Service Discount Broker" in newspapers and magazines, through direct-mail, and on television. During the relevant period, the firm's advertising centered principally around its "Commission-Free Trading" service to individuals who maintain an account with a minimum equity balance of $500,000.

Customers with these "SmartTrade" accounts can trade 1,000 or more shares of any stock, without being charged a commission, "commission free". Customers who did not qualify for a SmartTrade account nevertheless could trade commission free anytime they bought 1,000 or more shares of an Olde recommended stock. The firm called this latter service "SmartTrading," until it was discontinued in December 1996. Olde also attracts customers by marketing a money market fund.

During the relevant period, the special venture program and related trading became increasingly important to the firm, growing more than four fold. During that period, special venture and related trading revenue as a percentage of total firm revenue increased from 32% to 46%. From 1990 through August 1995, Olde grew from 160 offices employing 375 RRs, to 197 offices employing 1,185 RRs.

D. Olde's Compensation, Production and Training Practices

Olde implemented and maintained certain policies and procedures which had the effect of emphasizing the sale of

special venture stocks. Olde's compensation system provided substantially higher payouts for the sale of special venture stocks than for all other stocks. Olde enforced a variety of production requirements and position quotas on its RRs, the effect of which was to require RRs, if they were to be successful, to concentrate their selling efforts on special venture stocks. Through an internal system of sales credits, Olde provided economic incentives to RRs to recommend those special venture stocks which would provide them with a higher payout.[4] Finally, Olde trained its RRs in high pressure sales techniques.

As illustrated below, a number of Olde RRs responded to the firm's compensation system and production requirements and to the availability of high sales credits on particular special venture stocks, by concentrating primarily on the sale of those special venture stocks that offered high sales credits, and by soliciting their customers to purchase a special product at least every six months.

1. Olde's Compensation Practices

During the relevant period, Olde's compensation system created the potential for a conflict of interest between Olde and its customers. Olde RRs received a salary of $1,200 per month. The remainder of their monthly income was primarily dependent on sales of securities to the firm's customers.

While Olde RRs could earn compensation for executing trades in the myriad of stocks that were not followed by Olde's research department ("non-Olde stocks"), as a practical matter, the payout received by RRs for those trades was relatively insignificant. Before Olde RRs could earn commissions from such "agency trades,"[5] they were

required to generate monthly gross commissions from such trades of $5,000, at which point they received 5% of that gross amount.[6] At $10,000 in monthly gross commissions from agency trades, an RR would earn 10% of the gross amount. RRs, however, found it difficult to reach the $5,000 level in agency trade gross commissions because commissions on such trades were based on the firm's discounted commission schedule.

The payout for trades in Olde's special products was, in contrast, generous. RRs who generated $10,000 or less in monthly "special products gross" received 20% of the gross figure as their monthly payout. As is discussed in more detail below, an RR's "special products gross" was the monthly total of any markups, markdowns, or commissions charged to the customer, sales loads on fund products, and a share of the spread on his or her special venture stock trades. Once an RR generated monthly special products gross of more than $10,000, the payout on the total gross figure increased to 33%.[7] Commissions generated from trades in agency stocks did not count toward the "special products gross."

A compensation system that provides for extra compensation to RRs for the sale of particular products creates the potential for a conflict of interest between a firm and its customers.[8] The compensation system at Olde, which provided for generous rewards to RRs for the sale of special venture stocks relative to other trades, jeopardized the provision of unbiased investment advice and provided an inducement for RRs to recommend transactions in securities in which they had the greatest financial interest.

2. Olde's Production Requirements and Position Quotas

Olde's production requirements and position quotas emphasized the sale of special venture stocks. To be considered for "commission privileges," that is the right to be compensated under the formula described above, newly licensed Olde RRs were required to generate special products gross of at least $15,000 for a minimum of two consecutive months. At that point, the firm's National Sales Department considered whether to grant the RR commission privileges. The factors Olde considered as relevant to that determination included the ability to sell special products, the ability to persuade previously inactive customers to buy special products, and the ability to prospect for new customers. An RR's success in servicing the firm's agency trade business was not a factor.

Once RRs earned commission privileges, they were required to meet specific production quotas related exclusively to their ability to sell special products. Specifically, RRs with commission privileges were required to generate $10,000 each month in special products gross and sell an additional $100,000 per week in fixed income products or mutual funds.[9]

Increasing "money line market value" and "building positions" were mainstays of Olde's sales emphasis. "Money line market value" was the aggregate value of all customer accounts. "Building a position" meant making a new investment in a special venture stock not already in a customer's account. In order to maintain commission privileges, Olde RRs were required to build an average of two special venture stock positions per day worth at least $20,000 in the aggregate.[10] Significantly, in calculating the

number of positions built by an RR on any day, the firm subtracted any positions sold that day. Also, as mentioned above, the net gain of two stock positions had to add at least $20,000 to the RR's "moneyline market value."[11]

Olde's requirement that its RRs generate at least $15,000 in special products gross in two consecutive months in order to earn commission privileges placed its newly hired and licensed RRs in an atmosphere in which instances of churning and unsuitable recommendations could and did occur. Similarly, by requiring RRs to build positions in special venture stocks or run the risk of termination or a lower commission payout, Olde ensured that its RRs would continue aggressively to attempt to induce customer purchases in special venture stocks.

Olde's policies created an environment in which the pressure for production overshadowed suitability determinations. In this environment, Olde's supervision in some instances as to suitability was inadequate. Certain Olde RRs approached the issue of suitability by doing nothing more than making sure that the customer's preference profile ("CPP") information on file was not patently inconsistent with the trading activity in the account. The CPP consisted of information extracted from the account opening form, which the customer signs, regarding the customer's Investment experience, investment goals, and risk tolerance. The information from the account opening form was put into Olde's computer system, making it accessible firmwide. Certain Olde RRs changed this information by filling out a "CPP Update Form," which, unlike the account opening form, did not require a customer signature. These RRs changed CPPs without telling their customers, in order to conform the stated investment

objectives to the aggressive manner in which the RRs were trading the accounts.

3. Olde's Use of Sales Credits

Olde employed a system of differing sales credits, ranging from $.0625 to over $1.00 per share for the purchase of different special venture stocks. These sales credits often made up the largest portion of an RR's monthly special products gross. The remaining amount of an RR's monthly gross came from markups and markdowns, which were relatively small because they were calculated under the firm's discounted formula for commissions on non-Olde stocks. Under the compensation practices of Olde, an RR's selection of which special products to recommend had a direct impact on the RR's monthly special products gross, and therefore monthly income.

Olde kept its sales force informed of the sales credits by posting them on its firm-wide computer system. Every RR had a computer terminal on his or her desk and could access the credit information instantaneously. The credits changed frequently, and the firm employed staff in its Detroit headquarters to keep the "credit screen" updated continuously. The firm flagged high credits on the credit screen by placing exclamation points or asterisks on either side of those credit figures. Traders also telephoned RRs to alert them to stocks paying high credits. When Olde traders needed to purchase a particular stock but could not find it in the market, at times, they offered "sell-side" credits to Olde's RRs, some of whom would then attempt to convince their customers to sell the stock.

Olde's traders set and frequently changed the sales credits, designating a portion of the spread as the credit. With

the sales credits coming from the spread, stocks with large spreads tended to have larger credits.[12] Because sales credits could influence the decisions that RRs made as to which securities to recommend, there was the potential for a conflict of interest between Olde and its customers to the extent that those securities which carried the highest credits tended to be securities that were more speculative issues, and therefore rarely suitable for a conservative investor.

4. Olde's Practices and Procedures Regarding RRs and Their Customers Who Failed to Effect Transactions in Special Products

During the relevant period, Olde implemented a so-called "six month rule." Under the six-month rule, in order to keep a customer, an RR had to execute a buy transaction in a special product in that customer's account at least once every six months. Sales transactions did not count, nor did purchases of non-Olde stocks, regardless of the size of the trades. If a customer did not purchase a special product within six months, the customer's account was reclassified as a "house account" and coded "999" in Olde's computer system, to which other RRs had access. The customer had no voice in the matter. From that point on, any RR could solicit the customer to buy a special product. If another RR was successful in getting the customer to buy a special product, the customer would then be assigned to that RR, who would keep the account as long as he or she abided by the six-month rule. The firm encouraged the sales force to waste no time on people who repeatedly rejected the firm's recommendations.

5. Olde's Hiring and Training Practices Encouraged the Use of High Pressure Sales Techniques

(a) Olde Hired Recent College Graduates Without Prior Securities Industry Experience

During the relevant period, many of Olde's new hires were recent college graduates with no prior securities industry experience. The interview process reveals much about what Olde looked for in a new RR. As part of the interview process during the relevant period, prospective RRs were given a research report for one of the firm's special venture stocks and told to study it for 10 minutes, at the conclusion of which they were required to "pitch" the stock to an Olde regional manager, the goal being to get the "customer" to buy 1,000 shares of the stock. Those who did well were hired.

Once hired, new employees began an apprenticeship program Olde called the graduated B52/B7FI and Assistant Programs ("the assistant programs"). Under the assistant programs, all new hires began work as "call center trainees," prospecting for new customers while studying for the Series 52 examination. If the trainees passed their Series 52 examination on the first try, they were allowed to continue in the program; if not, they often were dismissed.

After studying for and passing their Series 52 examination, the municipal securities representatives, known within Olde as the B52s, began selling municipal securities and studying for their Series 7 examination. In order to continue in the program, the assistants were required to pass their Series 7 examination on the first try, sell $500,000 in fixed income investments, and open 20 new accounts, within five months of entering the program.

Those who achieved these goals became B-7 Licensed Assistants ("licensed assistants") and were sent to firm headquarters in Detroit for two-weeks of classroom training, which Olde attempted to conduct each month. RRs who did not achieve those goals often were dismissed.

(b) Olde Instructed Its RRs in High Pressure Sales Techniques

During the relevant period at the two-week training classes held periodically at Olde's headquarters, Olde taught its new RRs a number of specific techniques designed to increase their chances of selling special venture stocks, thereby maximizing the firm's profit and the income to the RRs. The two weeks of classroom instruction focused primarily on intensive sales training. In addition to lectures on specific sales techniques, the firm distributed sales scripts and set aside time for the new RRs to practice those techniques on each other in role-playing sessions. With superbrokers, regional managers and occasionally Snider looking on, the new RRs paired up and pretended to sell each other special venture stocks. In these sessions, the trainee playing the customer tried to end the conversation without buying anything, while the trainee playing the RR attempted to make a sale, regardless of any objections tendered by the "customer."

(i) Cross-Selling

One technique taught in training was that which Olde referred to as "cross-selling." Olde provided its RRs with "cross-selling directories," which juxtaposed non-Olde stocks with special venture stocks in the same general industry groups. The special venture stocks in these

directories were securities which had been analyzed by Olde's research department. Under the compensation practices described above, Olde RRs received relatively insignificant compensation for trades in non-Olde stocks listed in the directories. Olde RRs were taught to attempt to convince customers who wished to place an order for the purchase of a non-Olde stock to purchase a special venture stock instead.

Significant numbers of Olde RRs viewed aggressive cross-selling as necessary to survive at Olde since the firm paid RRs relatively insignificant compensation for trades in non-Olde stocks. As Katzman said at the two-week training course, "why let someone buy a stock you're not going to get paid on?"

(ii) "Three Bullets and a Close" –

Sales Scripts

On the topic of how to convince customers to buy special venture stocks, the firm taught its RRs a technique known among the firm's RRs as "three bullets and a close." The technique required RRs to pick out three positive facts from the research reports Olde issued on its special venture stocks and to "create a sense of urgency" by delivering those facts to the customer in rapid succession, followed immediately by a closing (a concluding statement designed to prompt the customer to make a decision) from a script of closings the firm handed out at training. Among the closings on the script were: "The stock is going up. Let's buy 1000 shares," "My favorite stock is ___ ___. I'm buying it for all my customers and I would like you to buy 1000 shares," and "The market is down, this is no time to run and hide, this is a buying opportunity. The stock is going

up let's buy 1000 shares." If the customer did not agree to buy after the first three bullets and a close, the technique required the RR to pitch three more bullets and another close and to repeat the pattern until the customer bought. Snider would give demonstrations of these techniques during training sessions.

(iii) Creating a Sense of Urgency

Creating a sense of urgency in solicitations to customers was a theme in Olde's sales manual during the relevant period. For example, the manual described the "Take Away Close," which required the RR to tell the customer, "If you don't buy today, you won't be able to get the product tomorrow or be able to buy the stock at the same price." In addition, the sales manual instructed Olde RRs to solicit new customers quickly and aggressively. "Remember," the manual stated, "the romance of a relationship is much stronger in the first two weeks. Build positions in many different issues during this time." Moreover, Katzman made it well known that he did not want RRs talking for extended periods with any one customer and even distributed hundreds of three-minute egg timers, purchased by the firm's then president, to its RRs to remind them not to talk too long to any single customer.

(iv) Responses to Objections

In addition to the script of recommended closings, in numerous training sessions during the relevant period, Olde distributed to new RRs a script of suggested responses to common objections raised by reluctant customers. For example, to the objection "I have no money," the script directed the RR to "Explain how margin can work."

To the objection "I never heard of the company," the RR was to respond "The company makes money, is a market leader, and the stock is going higher." To the objection "I have to check with my wife," the RR was to respond "What if (she says) 'NO'? – I'm telling you this idea because I'm an expert. I'm not the final authority, but I make a living doing this. I hope the person you check with cares as much about your financial success as I do." And, to the objection "I'll watch it," the RR was to respond "You'll only watch it go up. Stop watching and buy the stock, it is going higher."

The objection script was used even though it called upon the RRs to make misrepresentations, the responses calling for the RRs to represent that the stock "is going up" being only the most obvious examples. Another example is the response to the objection "I'll watch (the stock for awhile)," which called for the RR to respond "I've been watching this stock for two years. This is the time to buy 1,000 shares." Given the high turnover at Olde, the majority of its RRs had not been in the securities industry for two years, much less following a particular stock for two years. Another misrepresentation from the script came in response to the objection "I don't take recommendations." The script called for the RR to respond "I spend 60 to 80 hours a week analyzing and researching Investments. We are highly qualified to give recommendations." Former employees testified that, in their experience, the only "analyzing" RRs did was reading Olde's research reports in order to extract "bullets" for their sales pitches.[13]

(v) Use of Margin

Olde also trained its new RRs to recommend that customers use margin, and the firm reinforced that training in a

number of ways. For example, in the firm's sales manual the firm touted margin as a way the RRs could increase their compensation. Specifically, in the part of the manual devoted to explaining how RRs get paid by reference to the number of shares traded multiplied by the size of the credits, the manual stated "Let's now take a look at some payout examples. Looking at the examples, you can see how margin, when suitable, can substantially increase your payout." The page that followed was a list of six examples demonstrating how RRs could increase their compensation through using margin because customers could increase their purchasing power by utilizing margin. Centered at the bottom of this page of examples, in capital letters, were the words "THINK BIG!!!" In addition, Olde's standard two-page account opening form included a margin account agreement. Some customers did not realize that they were requesting a margin account when they opened their account at Olde.[14]

(c) Senior Olde Officials Instructed RRs to Make Misleading Statements Regarding the. Financial interest of the Firm and Its RRs in Effecting Transactions

As previously noted, during the relevant period, the cornerstones of Olde's marketing and advertising campaign were its Smart Trade and Smart Trading programs. Under the first program, a customer with at least a $500,000 account can purchase 1,000 or more shares of any security without a commission; under the second program, any customer could purchase 1,000 or more shares of an Olde recommended stock commission free. Senior Olde officials disclosed in response to inquiries by the financial press that the firm, on commission-free trades, could earn revenue by capturing the spread on

those securities in which the firm made a market. In addition, pursuant to Rule 10b-10, customer confirmations disclosed that the firm had acted as principal in the customers' transactions and was a market maker in the security.

However, certain senior sales officials instructed the firm's RRs at the outset of the Smart Trade program that if customers asked them how the firm made money they were to say that the firm hoped to make money on other trades or on margin interest, omitting the fact that the firm earned revenue by capturing the spread. Another senior sales official instructed the firm's RRs to disclose that the firm could capture the spread to sophisticated customers who asked but to tell other customers that the firm hoped to make money on other business from the customers. In direct responses to certain customers who asked, some RRs misleadingly failed to disclose that Olde and its RRs profited from the spread.

E. Specific Sales Practice Violations at Olde

Olde's policies, practices and procedures, discussed above, operated in concert to create an environment in which a variety of violative sales practices occurred, exacerbated by the pressure to meet production goals.

The pressure to sell at Olde was overt. A significant number of Olde RRs concentrated their selling efforts on those special venture stocks which carried a high sales credit, a practice known to some within the firm as "credit shopping." RRs who engaged in this practice aggressively solicited their customers to purchase stocks with large sales credits without consideration as to the suitability of such securities for the customers being solicited.

To maximize their compensation, meet production quotas and avoid losing customer accounts through the application of Olde's six-month rule, certain Olde RRs in various branch offices churned customer accounts and engaged in unsuitable and unauthorized trading in customer accounts and utilized high pressure sales techniques accompanied by misrepresentations and omissions of material facts to induce customer transactions in special venture stocks.

The following are examples of fraudulent conduct of Olde RRs employed at branch offices nationwide in the context of specific customer accounts:

1. Clearwater, Florida Branch Office

In March 1993, a married couple opened an account at Olde's Clearwater office. This couple was in their forties and had five children, the oldest of whom suffered from Downs Syndrome. In early 1993, the wife received a settlement in connection with an automobile accident which disabled her. The couple told the Olde RR who opened their account that they did not have any investment experience and they wanted to invest the net proceeds of the settlement in a mutual fund and a money market account. The Olde RR was aware that the couple wanted to preserve their capital and assured them that their funds would not be put at risk.

During the first month, the couple's RR executed 50 trades utilizing margin. By April 30, 1993, their initial equity had declined from $38,000 to $13,880. Upon receiving their account statement, the couple questioned the RR about the equity summary appearing on the statement. He falsely told them not to worry about it, that it was an error that would be corrected on the following month's statement.

Many of the confirmations the couple received were incorrectly marked unsolicited and the couple was unaware that they were trading on margin until they received their first margin call. The couple was inexperienced and relied on the advice of the RR. From March 23, 1993 through July 30, 1993, while controlling the account, their RR executed more than 200 trades in special venture stocks generating an annualized turnover rate of 103.15.

2. Apopka, Florida Branch Office

In March 1994, a 51-year-old woman opened an account at the Apopka office to invest $200,000 from her divorce settlement. Her only investing experience consisted of one year's investing in mutual funds, and she had no experience buying stock on margin. She told her RR that this was her only money, that she needed safe income investments, that she did not understand the stock market, and that she did not want to invest in common stocks. She also told the RR that her primary objective was to invest in low-risk investments to generate enough income to make monthly mortgage payments on a house she planned to purchase later that year. The RR told her he understood her investment objectives and he drew up a conservative investment plan for her.

Before leaving on an overseas trip in April 1994, the customer instructed the RR not to trade in her account while she was gone and to mail her monthly statements to a friend. Despite this woman's instructions, the RR ignored the investment plan and instead used her money to trade in special venture stocks, which were unsuitable for this customer. When the customer returned to the United

States she did not return home, but she called the RR to check on her account balance and told him to transfer $88,000 into the money market fund. Between August and October 1994, the customer and her RR had several conversations during which she inquired about the balance of her account. In those conversations the RR never told the customer that he had not followed the investment plan and he provided her with inflated account balances.

Before the customer returned to Florida, the RR picked up the statements from the customer's friend and mailed them to another address, thereby delaying the customer's receipt of the statements. On October 6, 1994, the customer called Olde to arrange to have $88,000 from her money market fund available for her house closing. The customer spoke to another RR who informed her that her RR had never purchased money market fund shares for her and since March 28, 1994 the RR had been buying and selling special venture stocks on margin in her account, without her knowledge, consent or authorization.

Between April and October 1994, the RR executed approximately 110 unauthorized trades in the woman's account creating a loss of approximately $70,000. The RR's trading during that period generated an annualized turnover rate of 13.88.

3. Seminole, Florida Branch Office

In April 1993, an 83-year-old woman opened an account at the Seminole office. At that time, the woman's husband was suffering from the late stages of Alzheimer's disease and required almost around-the-clock attention. This elderly woman told the branch office manager about her husband's medical condition and that she and her husband

maintained a portfolio of nonvolatile investments, including money market funds, other mutual funds, and blue chip equities. The customer also told the branch office manager that she required safe, high-dividend investments that would yield a steady income. In addition, the woman told the branch office manager that she did not want a margin account.

The branch office manager opened a margin account: for this woman and immediately began pressuring her to deposit her blue chip stock certificates. Although she and her husband had always held their stock certificates themselves, she ultimately deposited them into her Olde account. The customer's husband died in June 1993. The account was transferred to Bayonet Point, Florida in August 1993, and another RR took over the handling of this woman's account in September 1993. The RR befriended the customer and won her trust to the extent that she even gave him gifts. Among other things, the customer gave the RR $5,000 because he falsely told her he was an orphan and needed money to find his real mother.

The branch office manager and the RR repeatedly purchased and sold special venture stocks in the customer's account without her prior knowledge, consent or authorization. These stocks were unsuitable for this customer. Between April 1993 and May 1994, the branch office manager and the RR executed 243 trades in the customer's account, generating an annualized turnover rate of 5.09 and a loss of approximately $147,000. Many of the 243 trades were unauthorized and until August or September 1993, the customer was unaware that she was on margin. Once she learned that she was on margin, she repeatedly told the RR to end her margin trading, but her instructions were ignored. In addition to paying over

$29,000 in commissions, she incurred over $13,600 in margin interest. At one point, her margin debit balance reached $440,000.

4. Orlando, Florida Branch Office

In the summer of 1993, a retired rabbi and his wife opened an account with the Orlando office because of Olde's advertisements promoting "commission-free" trades. Prior to opening their Olde account, the rabbi and his wife had minimal experience in buying and selling stocks and bonds.

The rabbi and his wife made it clear that they were not speculators. The rabbi instructed the RR to purchase Barclay Bank preferred stock for the account. Instead, the RR purchased a special venture stock and utilized margin to increase the size of the unauthorized purchase.

The couple was later assigned another RR to handle their account. The rabbi told this RR that he was an inexperienced investor and he wanted income and growth. He also explained to this RR that he had cancer and he intended on funding a memorial foundation with the money invested at Olde. The rabbi told the RR that this money was "God's money" and must be protected. In October, 1993, the new RR persuaded the couple to invest over $500,000 with Olde. Thereafter, the RR recommended numerous purchases and sales of special venture stocks to the rabbi and his wife. Because they did not believe they were qualified to evaluate and question the RR's advice, they routinely followed his recommendations. These stocks were unsuitable for this customer.

The RR told the rabbi and his wife that he did not make any money from the trades. The couple felt so badly about how hard the RR was working for them without compensation, that they occasionally took gifts to the office for him and the other brokers.

Between August 1993 and May 1994, the couple's RR generated an annualized turnover rate of 7.78 in their account. The account suffered losses of approximately $200,000.

5. Orlando, Florida Branch Office

In 1987, a retired General Motors shipping/receiving clerk opened an account at the office in Port Richey. The customer's account was transferred to the Orlando, Florida office of Olde In 1988, when he and his wife moved to that city.

The customer transferred to Olde his Food Lion Inc. ("Food Lion") common stock which he had purchased in the early 1970s. This stock, which appreciated to several hundred thousand dollars, was the primary asset in his account and represented almost all of his net worth. Until September 1993, when a new RR was assigned to handle the account, there was virtually no trading activity in this customer's account. The new RR began aggressively soliciting the customer to make frequent purchases and sales of special venture stocks. The customer routinely followed the RR's recommendations. In addition, the RR made several unauthorized trades in the customer's account.

Between September 1993 and February 1995, the RR's trading generated an annualized turnover rate of 27.16

in this customer's account. The customer also incurred margin interest costs of approximately $12,000.

6. Fort Lauderdale, Florida Branch Office

In February 1993, a married couple opened an account at the Ft. Lauderdale office. The husband, an executive with a travel agency, and the wife, a homemaker, told the branch office manager that they were inexperienced in the stock market. They also told the branch office manager, who was their RR, that they wanted a broker who would preserve their capital and serve their needs in a cautious and conservative manner. Nevertheless, the branch office manager completed the new account application to reflect that they were aggressive investors who were investing for growth and speculation. The branch office manager told the couple that the account application was just a "formality" and that it was unnecessary to read the document before they signed it.

When the couple opened their account and made their initial $30,000 deposit, they instructed the branch office manager that they were not prepared to make any investments at that time. Nevertheless, the branch office manager immediately began purchasing special venture stocks in the couple's account without authorization. Six weeks later, the husband gave the branch office manager an additional deposit of $6,330, who represented that the account had a cash balance of $36,330. However, the account had no cash balance, and the equity in the account had fallen to less than 50% of the amount that the couple had initially deposited.

Between February and May 1993, the branch office manager executed 35 unauthorized transactions in special

venture stocks in this couple's account, frequently utilizing margin to effect trades. The branch office manager's unauthorized trading generated an annualized turnover rate of 41.91. The account suffered losses of more than $25,000.

7. Raleigh, North Carolina Branch Office

In June 1993, an investigator with a North Carolina state agency opened an account at the Raleigh office because of Olde's low commissions. The customer, who had graduated from high school and attended one year of business school, had never invested in securities. The customer only filled out his name and address on the new account form and signed the back. Neither the RR, nor anyone else at Olde, ever asked the customer about his investment experience, what kind of investor he was, or what his investment objectives were. Nevertheless, the customer's new account application indicated that he was an aggressive investor seeking growth and speculation.

After the customer invested $60,000, representing all of his and his father's savings, in Snapple Beverage Corp. stock, the RR pressured the customer to buy special venture stocks. Shortly thereafter, another RR took over the customer's account and called him frequently to urge him to trade special venture stocks.

When the customer told the new RR that he had no more money for investing, the RR recommended purchasing on margin, without explaining the risks associated with margin. Instead, the RR falsely assured the customer that his dividends would offset the interest on the margin account. The customer did not understand that there were additional costs associated with frequent trading, because

he thought all of his trades were commission-free. Other than the initial transaction, the RRs solicited all the trades in this customer's account. The customer routinely followed the new RR's advice, telling the new RR that he was depending on him to make the right decisions.

Between June 1993 and December 1994, trading solicited by the account's RR generated an annualized turnover rate of 7.55. The second RR solicited 23 purchases totaling more than $359,000 in the account. The account suffered losses of approximately $45,000.

In October 1993, an employee of another North Carolina state agency opened an account at the Raleigh office. The customer, who graduated from high school and had four years of experience investing in blue chip stocks, had never used margin. The customer told the Olde RR who filled out the new account application that he was a conservative to moderate investor seeking growth. Nevertheless, the RR indicated on the application that the customer's goal was speculation. Seeing the RR check the box marked speculation, the customer objected and insisted that the RR correct the application.

Noticing that the application included a margin agreement, the customer told the RR that he did not want a margin account. The RR assured the customer that he would never have to use margin and told him to sign the application, which he did. Nevertheless, purchases were later made in the customers account on margin without his knowledge, consent and authorization.

Another RR began handling this customer's account shortly after it was opened. The new RR solicited this customer to buy special venture stocks and convinced him to deposit his blue chip stocks into his Olde account. The

RR recommended that the customer make a "quick profit" by buying special venture stocks in advance of earnings reports. The RR frequently telephoned the customer at work, sometimes as often as three times a day, pressuring him to trade special venture stocks.

Although the RR had told the customer that he had sufficient cash in the account, the RR purchased stocks for the customer utilizing margin. Once the customer became aware that the purchase had been made on margin, he made it clear that he intended to pay the debit immediately and get off margin.

During the time that the new RR handled his account, the customer was separated from his wife, was being treated for clinical depression, and was adjusting to the demands of a new job. The customer relied heavily on the RR's advice because of his personal situation. In addition, the customer believed he was unqualified to question the RR's advice, and therefore routinely followed the recommendations. In fact, all but two of the 19 purchases in the customer's account were recommended by the RR.

Between November 1993 and April 1994, the trading solicited by the second RR generated an annualized turnover rate of 8.88 and losses of over $11,000 in the customer's account.

8. Marietta, Georgia Branch Office

In February 1993, an insurance agent opened an account at the office in Marietta to invest $5,600 in a stock that a relative had recommended. This customer was married and the father of four children and his only investment

experience consisted of a single stock trade executed two years earlier.

The RR did not ask him about his investment experience or objectives. According to the customer, the new account application overstated the customer's investment experience, annual income and net worth. On the initial transaction, the RR recommended that the customer use margin to buy twice as much of the stock. Two weeks later, the RR recommended that the customer sell his stock and purchase a special venture stock because a group of Olde customers had joined together to buy a large block of this special venture stock and the group's purchase would cause the price to increase. The RR claimed that the customer had to act within a couple of hours if he wanted to participate. The customer followed the RR's recommendation and the RR aggressively recommended other special venture stocks which the customer routinely followed. Other than the first transaction, all of the customer's trades were based on the RR's advice.

From February through May 1993, the RR executed 10 transactions in the customer's account, thereby generating on annualized turnover rate of 69.72. By May 1993, when the customer closed his account, his equity had fallen to a debit of approximately $39 and he suffered losses of approximately $22,000.

9. Bayonet Point, Florida Branch Office

In September 1993, a 60-year-old homemaker opened an account at the Bayonet Point office. The customer told the RR that she only purchased five stocks in her life, all of which she still held, and that she was unsophisticated in business matters and the handling of money. In addition,

she told the RR that she needed income producing investments because she was unable to work with growth as a secondary objective. She also told the RR that she wanted conservative investments because she was afraid of risk, and that she did not want to trade on margin. The RR had this customer sign a blank new account application.

The RR called the customer frequently and convinced her to sell her five stocks and purchase special venture stocks by telling her, "I'll make you a millionaire in two years." She always followed the RR's recommendations. Between September 1993 and April 1994, the RR executed 44 trades in this customer's account, 36 of which were unauthorized. When the woman questioned the RR about the trading, he told her "not to worry."

Between September 1993 and April 1994, the RR generated an annualized turnover rate of 5.67. The account suffered losses of over $12,000 and the RR earned over $2,500 in commissions.

10. Schaumburg, Illinois Branch Office

In 1984, a research engineer opened an account at the office in Schaumburg. This customer made his own investment decisions, trading three to four times per year until 1993 when a RR in the Schaumburg office began aggressively soliciting him to purchase special venture stocks on margin.

The customer routinely followed the RR's recommendations. Even so, the RR effected dozens of unauthorized trades in the customer's account. The first unauthorized trading occurred in March 1994, while the customer was out of town. Despite the customer's insistence that he

wanted to be in "the decision making loop," the RR engaged in more unauthorized trading in November 1994. When the customer complained again, the RR indicated that he understood. But, in December 1994 and January 1995, while the customer was on vacation, the RR executed 30 more unauthorized trades.

Between January 1994 and January 1995, the RR's trading in this customer's account generated an annualized turnover rate of 9.14.

11. Overland Park, Kansas Branch Office

In June 1992, a retired AT&T repairman opened an account at the Olde office in Overland Park to invest $5,000. He told his RR that he had no investment experience, although he owned AT&T shares obtained through his employment, and that he was a moderate investor seeking growth.

The RR began pressuring the customer to deposit his AT&T shares into his Olde account. The customer resisted at first, but ultimately relented on the condition that the AT&T shares never be at risk. Thereafter, the RR called this customer frequently recommending that the customer buy special venture stocks. The RR also recommended that the customer sell the special venture stocks soon after he purchased them to invest in other special venture stocks. Unbeknownst to the customer, the RR was using the customer's AT&T shares as collateral to buy additional special venture stocks on margin.

The customer trusted the RR and routinely relied on his advice. The RR solicited all but two of the 17 purchases in the customer's account. Between October 1993 and June

1994, the RR executed solicited, special venture trades in this retired customer's account which generated an annualized turnover rate of 5.98. The account suffered a $9,000 loss.

12. Phoenix, Arizona Branch Office

In December 1993, a real estate agent opened an account at one of the Phoenix offices. The customer explained to his RR that his only stock purchase to date was a single mutual fund and that he wanted to invest $24,000 which he received from the sale of his house. He wanted to invest this money for nine months, at which time he would need the money to pay for his upcoming wedding and to build a new house with his fiancée. He also told the RR that he was looking for a better return than banks were offering. The RR responded that he averaged a 33% return on his customers money and that he could make just as much for him if he was willing to follow his advice. The RR told the customer that under the worst-case scenario he would enjoy a 10-15% return on his money.

The Olde RR began frequently calling the customer to recommend margin trades in special venture stocks. The customer routinely followed the RR's recommendations, buying a special venture stock almost every time the RR called him. These stocks were unsuitable for this customer. All but two of the 28 purchases in the customer's account were recommended by the RR.

From December 1993 through May 1994, the RR generated an annualized turnover rate of 39.82 in this customer's account. The customer lost $19,000.

13. Cleveland, Ohio Branch office

A 38-year-old mother who worked as an assistant treasurer for a manufacturing company opened an account at the office in Cleveland in September 1993. Before opening her account at Olde, she had invested only in blue chip stocks and had never traded on margin. She transferred all her blue chip holdings, worth approximately $55,000, into her Olde account. The customer explained to her RR that she was a conservative investor who preferred a "buy and hold" strategy, and that by transferring to Olde she was only looking for a way to reduce the commissions she would pay if she sold her blue chip stocks.

The RR suggested that the customer could make more money if she were more aggressive. In addition, he told her that customers who had followed his recommendations had averaged a 30% return on their investments in the previous year. This representation was, however, not true. Nevertheless, the RR told the customer that she could make as much if she would follow his recommendations.

The RR began frequently telephoning the customer, sometimes making several calls a day, and pressuring her to make margin purchases in special venture stocks. The RR convinced her to sell her blue chip holdings.

To persuade this customer to trade special venture stocks frequently and on margin, the RR told the customer that he was an expert. The customer had never heard of most of the stocks the RR was recommending. On several occasions when she requested written information on the issuers, the RR responded that there was not enough time to send written information, and that if the customer waited she would miss an opportunity. There were several times when the RR had the customer in and out of a

special venture stock in one day, and often, when a special venture stock declined in value, the RR told the customer she needed to recoup her loss by selling that stock, and purchasing another special venture stock instead.

Eventually, the customer's account was heavily margined. In addition, the RR persuaded the customer to borrow money on her home equity credit line to pay for additional purchases of special venture stocks. The customer repeatedly expressed discomfort with both the frequency of the trading and the level of margin maintained, but the RR invariably responded that the customer should "trust him."

Between October 1993 and April 1994, the RR generated an annualized turnover rate of 10.05. The account lost approximately $49,000.

14. Wilmington, Delaware Branch Office

In February 1993, a 63-year-old retiree opened an account at the Wilmington office to invest $46,000 of his wife's inheritance. The customer had no previous investment experience, except in connection with his employer's retirement plan. Although the customer told the RR he was a conservative investor, the RR indicated on the new account application that the customer was both moderate and conservative.

The RR frequently called the customer recommending that he purchase special venture storks on margin. The customer, being inexperienced in investing and considering himself unqualified to question the RR's recommendations, always followed the RR's suggestions, These stocks were unsuitable for this customer.

During the period from February 1993 through November 1994, the RR generated an annualized turnover rate of 4.27 in the customer's account. During that same time period, the account lost approximately $42,800 or 93% of the customer's initial investment.

15. Minnetonka, Minnesota Branch Office

In 1991, a high school graduate who worked as a gas line installer, repairer and locator opened an account with the Minneapolis office. The customer told the Olde RR who opened the account that he had no investment experience and he was a conservative investor seeking income. The RR filled out the customer's new account application stating that the customer was a conservative investor with income as his investment objective. However, for reasons unknown to the customer, the RR also wrote "occasional speculation."

Shortly after the account was opened, it was transferred to a newly-opened Olde branch office in Minnetonka, Minnesota and the branch office manager and another RR jointly serviced the account. The customer trusted Olde, the branch office manager and the RR to make appropriate investment decisions for him because he lacked investment experience.

Other than the first purchase, the branch office manager and the RR solicited all of the trades in the customer's account. When one of them would recommend special venture stocks, the customer would ask how much money was needed and they would either tell him that he had sufficient funds in his account or that he needed to make additional deposits. The customer routinely followed their recommendations to trade in special venture stocks. These

stocks were unsuitable for this customer. Without the customer's prior knowledge, consent or authorization, the branch office manager and the RR used margin to effect purchases in the customer's account.

Between October 1993 and March 1994, the branch office manager and the RR generated an annualized turnover rate of 8.13 in this customer's account and more than $26,000 in losses.

16. Bloomfield Hills, Michigan Branch Office

In October 1992, a professional tennis instructor opened an account with the Bloomfield Hills office to invest the proceeds of a personal injury claim. Prior to opening his account, the customer had almost no investment experience for lack of money. The customer had attended but did not graduate from college. The customer told the RR who opened the account that he wanted safe investments that would secure his retirement. He specifically told the RR that tie did not want to speculate.

The RR called the customer frequently to recommend that he trade special venture stocks. Even before the customer received his settlement, the RR pressured him to invest by convincing him to borrow cash against his credit cards. Despite substantial losses in the account, the RR frequently reassured the customer that his investments were doing well and told him to place his trust in the RR's abilities.

Between October 1992 and April 1993, the RR, who is now the branch office manager of another Olde office, solicited almost every trade in this customer's account and generated an annualized turnover rate of 30.28. The account lost approximately $55,000.

17. Warren, Michigan Branch Office

In October 1993, a 47-year-old social worker with no experience in the stock market opened an account at the Warren office. She intended to invest her savings of $3,000 in a cash account because she wanted to earn more than the 2% her credit union was paying.

The branch office manager was her RR. Although the customer told the branch office manager that she was a single parent working two jobs just to make ends meet, the branch office manager completed her new account application picking "moderate" for her risk level and "growth" and "speculation" for her goals. Just days after opening her cash account, the branch office manager called and convinced the customer to trade on margin, explaining it as simply "using Olde's money to make money." Further, the branch office manager convinced this customer to withdraw $10,000 from her IRA to invest in special venture stocks by telling her that she had 60 days to "play around with" her money, and that after one positive move they could roll it right back into her IRA. This money was never rolled back into her IRA. These stocks were unsuitable for this customer.

All of the transactions in her account were solicited. She trusted the branch office manager and relied extensively on his investment advice telling him that he was the expert. The customer followed the branch office manager's recommendations on all purchases and sales in her account. From October 1993 to December 1994, the customer received 21 margin calls and ultimately lost her entire life savings of approximately $20,000. During this period, the RR generated an annualized turnover rate of 12.35.

IV.

Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit the use of fraudulent practices in connection with the offer, purchase, or sale of securities. Section 15(c)(1) of the Exchange Act and Rule 15c1-2 thereunder prohibit brokers and dealers from engaging in fraudulent conduct in effecting transactions in securities or in inducing or attempting to induce the purchase or sale of securities. Among other things, those provisions make it unlawful to employ any device, scheme or artifice to defraud.

A. Churning

Churning is a manipulative or deceptive device within the meaning of the antifraud provisions. *Hotmar v. Lowell H. Listrom & Co., Inc.,* 808 F.2d 1384, 1385 (10th Cir. 1987); *Mihara v. Dean Witter & Co., Inc.,* 619 F.2d 814, 821 (9th Cir. 1980). Churning consists of three elements: (1) excessive trading in a customer account, (2) control by the RR over the account, and (3) scienter on the part of the RR. *Mihara,* 619 F.2d at 821; *Craighead v. E.F. Hutton & Co., Inc.,* 899 F.2d 485, 489 (6th Cir. 1990).

As to the first element, excessive trading, the turnover rates reflected in the accounts of the customers described above ranged up to 103.15. These accounts were excessively traded under the circumstances. *See, In re R.H. Johnson & Co.,* 36 S.E.C. 467, 469-80, 485 (1955). For the second element, Olde exercised *de facto* control over the accounts described above in that the customers were, for the most part, unsophisticated and deferred to their RRs totally for investment decisions. Moreover, in several of the accounts, the RR engaged in unauthorized trading.

"(T)he courts will often interpret this as a serious usurpation of control by the broker." *M & B Contracting Corporation v. Dale, et al.*, 601 F. Supp. 1706, 1111 (E.D. Mich. 1984), *quoting Leib v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp 951 (E.D. Mich. 1978), *affd mem.*, 647 F.2d 165 (6th Cir. 1981). In fact, unauthorized trading presents clear evidence of control. Finally, as to scienter, the misconduct discussed above grew out of the environment created by the compensation, production and training practices of Olde. Those practices created an environment in which certain RRs made recommendations for their own benefit and not that of their customers. Such trading, for the benefit of the RR, necessarily involves a "reckless disregard for the client's stated interests." *See Mihara,* 619 F.2d at 814.

B. Unauthorized Trading

The unauthorized trading which occurred in the customer accounts described above in section E.2, 3, 4, 5, 6, 9 and 10 constituted distinct violations of Sections 10(b) and 15(c)(1) and Rules 10b-5 and 15c1-2. In addition, the unauthorized trades demonstrated the firm's control over the accounts. In executing these trades, Olde RRs deliberately did not seek their customers' approval.

C. Suitability

Making unsuitable recommendations to customers without disclosing the unsuitability of those solicited investments, in breach of an affirmative duty to disclose arising from a fiduciary or similar relationship of trust and confidence, violated Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2. *See National Union Fire Ins.*

Co. v. Woodhead, 917 F.2d 752, 757 (2d Cir, 1990); *City of San Jose v. Paine, Webber Jackson & Curtis, Inc.,* 1991 WL 352485 at *2 (N.D. Cal. 1991); *see also Brown v. E. F. Hutton Group, Inc.,* 991 F.2d 1020, 1031 (2d. Cir. 1993).

The Olde customers described above in section E.2, 3, 4, 12, 14, 15 and 17, ended up with portfolios consisting primarily of those special venture stocks that were more speculative issues. With respect to such investors, with conservative investment needs and objectives, concentrating most or all of their assets in such special venture stocks was not suitable.[15]

Olde RRs did not disclose this unsuitability to any of the customers in question. As is discussed in more detail above, the RRs exercised strong influence and *de facto* control over some of these accounts. As a result, Olde, through its RRs, stood in a fiduciary or similar relationship or trust and confidence with these customers. From that relationship, there arose an affirmative duty to disclose the unsuitable nature of recommendations made to the customers. *See Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 906 F.2d 1206, 1214-17 (8th Cir. 1990); *Gochnauer v. A.G. Edwards & Sons, Inc.,* 810 F.2d 1042, 1048-49 (11th Cir. 1987); *Baker v. Wheat First Securities,* 643 F. Supp. 1420, 1428-29 (S.D. W.Va. 1986). Olde acted with scienter, in the form of a reckless disregard for the suitability of investment recommendations made by its RRs to the firm's customers, by focusing the firm's training primarily on aggressive sales techniques. Snider and Katzman participated in and conducted such training. Olde's compensation system encouraged its sales force to sell special venture stocks to their customers and some of the firm's RRs favored those special venture stocks which paid higher sales credits – that is, the special

venture stocks with larger spreads which correspondingly were more likely to be speculative – without making appropriate suitability determinations.

D. Misrepresentations and Omissions

In addition to prohibiting schemes and artifices to defraud, the antifraud provisions proscribe making material misrepresentations and omitting to state material facts, "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Olde RRs made numerous misrepresentations to many of the customers described above. For example, some Olde RRs often failed to disclose their use of margin to effect purchases in customer accounts. In addition, some RRs misleadingly failed to disclose in response to questions from certain customers that Olde and its RRs profited from the spread. *See* SEC *v. Hasho,* 784 F. Supp. at 1059; *Chasins v. Smith Barney & Co.,* 438 F.2d 1167, 1172 (2d Cir. 1970).[16] The RRs, knowing the undisclosed facts, clearly acted with scienter.

E. The Respondents' Liability

Olde is primarily liable for the violations of the antifraud provisions discussed above because such violations occurred in an environment created by Olde's compensation, production, hiring and training policies. *See In re Haight & Company, Inc.,* 44 S.E.C. 481 (1971); *SEC v. First Jersey Securities, Inc.,* 890 F. Supp. 1185 (S.D.N.Y. 1995). The conduct of the firm described in this Order satisfies the Supreme Court's definition of scienter in *Ernst* & Ernst *v. Hochfetder,* 425 U.S. 185, 193 n.12 (1976).

Snider and Katzman implemented Olde's policies and induced certain of the violations because they acted, at a minimum, recklessly in failing to respond adequately to certain problems brought to their attention that could be expected to and did occur given these policies.[17] Snider and Katzman were each a cause of certain of Olde's violations due to the foregoing conduct which they knew or should have known would contribute to such violations. E. Olde failed reasonably to supervise with a view to preventing such violations because he formulated and oversaw the adoption of most of these policies; such policies made it difficult to establish procedures and a system for applying such procedures which could have prevented the violations. E. Olde was a cause of Olde's violations due to the foregoing conduct which he knew or should have known would contribute to such violations.

V.

On the basis of this Order and the Offers of Settlement submitted by the Respondents, the Commission finds that: (a) Olde willfully violated Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder; (b) Snider and Katzman (i) willfully induced certain violations of such antifraud provisions, and (ii) were each a cause of certain of Olde's violations; and (c) E. Olde (i) failed reasonably to supervise with a view of preventing violations of such antifraud provisions, and (ii) was a cause of Olde's violations.

VI.

In view of the foregoing, it is appropriate and in the public interest to impose the sanctions specified in the Respondents' Offers of Settlement.

ACCORDINGLY, IT IS ORDERED that:

A. As to Olde:

1. Olde be and hereby is censured pursuant to Section 15(b)(4) of the Exchange Act;

2. Olde cease and desist from committing or causing any violations and any future violation of Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act;

3. Olde shall, within 10 days of the entry of this Order, pay a civil penalty in the amount of $4 million to the United States Treasury. Such payment shall be: (a) made by United States postal money order, certified check, bank cashier's check or bank money order; (b) made payable to the Securities and Exchange Commission; (c) hand delivered or mailed to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22313; and (d) submitted under cover letter that identifies Olde as a Respondent in these proceedings and the file number of these proceedings, a copy of such cover letter and money order or check shall be sent to Richard P. Wessel, District Administrator, Securities and Exchange Commission, Atlanta District Office, 3475 Lenox Road, N.E., Suite 1000, Atlanta, Georgia, 30326; and

4. Olde comply with its undertakings to:

a. retain within thirty (30) days of the date of this Order, at Olde's expense, an Independent Consultant ("Consultant"), not unacceptable to the Commission's staff who shall, among other things:

(1) conduct a comprehensive review of Olde's policies and procedures with respect to:

i) the compensation of RRs, branch managers, district managers and regional managers, including but not limited to, the manner in which the firm communicates the existence and amount of sales credits, if any, to RRs;

ii) the imposition of product specific sales quotas;

iii) practices used to sell securities to customers;

iv) the hiring and training of employees, including but not limited to:

(A) whether to extend the period of training for inexperienced RRs; and

(B) whether to broaden the program of continuing education for RRs and managers;

v) the compliance systems and procedures for the supervision of RRs, branch managers, district managers and regional managers;

vi) whether branch managers, district managers and regional managers must meet the same production quotas as RRs;

vii) whether customers must effect transactions in particular types of securities within a specified time period; and

viii) whether to disclose to customers different RR compensation schedules, if any, used for transactions in securities from different product families;

(2) recommend such other policies or procedures (or amendments to existing policies and procedures) as are

necessary and appropriate reasonably to prevent and detect violations of the federal securities laws; and

(3) prepare a written report of his or her findings and recommendations ("report") within six (6) months of the entry of this Order. Olde shall be provided a reasonable opportunity to comment on the Consultant's report;

b. adopt and implement, no later than sixty (60) days after receipt of the report (or such other time as the Consultant believes is necessary), at Olde's expense, such policies and procedures as recommended by the Consultant; provided, however, that as to any of the Consultant's recommendations that Olde determines is unduly burdensome and impractical, Olde may propose an alternative procedure reasonably designed to accomplish the same objectives. The Consultant shall reasonably evaluate such alternative procedure and, if appropriate, either approve the alternative procedure or amend the recommendation. If the Consultant does approve an alternative procedure or amends a recommendation, the Consultant shall prepare a written report which identifies such alternative procedure or amended recommendation and sets forth the Consultant's reasons for his or her decision ("supplemental report") within twenty (20) days of such decision. Olde shall abide by the decision of the Consultant and adopt and implement the alternative procedure or amended recommendation within the time period set by the Consultant in light of the nature of procedures;

c. authorize the Consultant to provide copies of the report to the Commission's Atlanta District Office within six (6) months of the entry of this Order;

d. authorize the Consultant to provide copies of the supplemental report, if any, to the Commission's Atlanta

District Office within ten (10) days of the date of the supplemental reports preparation;

e. cooperate fully and cause its affiliates to cooperate fully with the Consultant, including obtaining the cooperation of Olde employees or other persons under its control;

f. require the Consultant to enter into an agreement, providing that: (1) for the period of the engagement and for a period of two (2) years from the completion of the engagement, the Consultant shall not enter into any employment, consulting, or other professional relationship, including attorney-client, with Olde, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such; and (2) any firm with which the Consultant is affiliated or of which he or she is a member, and any person engaged to assist the Consultant in performance of his or her duties under this Order shall not, without prior written consent of the Commission, enter into any employment, consulting or other professional relationship with Olde, or any of its present or former directors, officers, employees, or agents in their capacity as such for the period of the engagement and for a period of two (2) years after the engagement;

g. retain, at Olde's expense, for a period of at least five (5) years after the effective date of this Order, an Independent Review Person ("Review Person"), not unacceptable to the Commission's staff, with experience in broker-dealer compliance matters. Within six months after the Consultant provides copies of the report as set forth in subparagraph c above, such Review Person shall conduct a review of (1) Olde's policies relating to the achievement of compliance with applicable federal securities laws and the rules and regulations of all self-regulatory organizations of which Olde is a member ("applicable rules and

regulations"); (2) Olde's implementation of policies and procedures adopted as a result of the Consultant's recommendations described in subparagraph b above; and (3) Olde's efforts to detect, correct and prevent failures to comply with applicable rules and regulations. After the first review, such reviews shall be conducted annually for the following three years. A final review shall be conducted 18 months after the last annual review. Within thirty (30) days of the completion of each review, the Review Person (1) shall prepare and deliver to Olde, its highest ranking officials, and the staff of the Atlanta District office, a written report with respect to the findings of such review, including any deficiencies in supervision and controls identified at Olde, and (2) shall prepare and deliver to Olde and its highest ranking officials a written report containing a summary of all government or SRO investigations of Olde or its employees; internal disciplinary actions; employee terminations for cause; pending customer suits and litigation or arbitration; and sales practice complaints, for the period under review; and

h. waive applicable statutes of limitation defenses, but not equitable defenses, in any arbitration proceeding filed within 180 days after the date of this Order by a present or former Olde customer who (1) purchased a "special venture" security from September 1, 1992 to August 31, 1995, and (2) with respect to that purchase, claims that his or her account was churned or subjected to unauthorized or unsuitable trading or that an Olde employee misrepresented or omitted to state a material fact concerning (i) the "special venture" security that was purchased, (ii) the use of margin, or (iii) the compensation or revenue anticipated or derived by Olde and its RRs from the purchases and sales of "special venture' securities, and (3)

has not already instituted an arbitration or filed a claim against Olde or has not otherwise reached a resolution of such claim with Olde; and

B. As to E. Olde:

1. E. Olde be, and hereby is, suspended from association with any broker, dealer, municipal securities dealer, investment adviser or investment company for a period of 12 months, effective on the second Monday following the entry of this Order;

2. E. Olde cease and desist from committing or causing any violations and any future violation of Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act;

3. E. Olde shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $1 million to the United States Treasury. Such payment shall be: (a) made by United States postal money order, certified check, bank cashier's check or bank money order; (b) made payable to the Securities and Exchange Commission; (c) hand delivered or mailed to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (d) submitted under cover letter that identifies E. Olde as a Respondent in these proceedings and the file number of these proceedings, a copy of such cover letter and money order or check shell be sent to Richard P. Wessel, District Administrator, Securities and Exchange Commission, Atlanta District Office, 3475 Lenox Road, N.E., Suite 1000, Atlanta, Georgia, 30326; and

4. E. Olde shall provide to the Commission, within 10 days after the end of the 12 month suspension period described above, an affidavit that he has complied fully with the sanctions described in subparagraph 1 above.

C. As to Snider:

1. Snider be, and hereby is, barred from association with any broker, dealer, municipal securities dealer, investment adviser or investment company, with the right to reapply for association after five (5) years in a non-supervisory capacity to the appropriate self-regulatory organization, or if there is none, to the Commission;

2. Snider cease and desist from committing or causing any violations and any future violation of Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act; and

3. Snider shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $100,000.00 to the United States Treasury. Such payment shall be: (a) made by United States postal money order, certified check, bank cashiers check or bank money order; (b) made payable to the Securities and Exchange Commission; (c) hand delivered or mailed to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (d) submitted under cover letter that identifies Snider as a Respondent in these proceedings and the file number of these proceedings, a copy of such cover letter and money order or check shall be sent to Richard P. Wessel, District Administrator, Securities and Exchange Commission,

Atlanta District Office, 3475 Lenox Road, N.E., Suite 1000, Atlanta, Georgia, 30326; and

D. As to Katzman:

1. Katzman be, and hereby is, barred from association with any broker, dealer, municipal securities dealer, investment adviser or investment company, with the right to reapply for association after five (5) years in a non-supervisory capacity to the appropriate self-regulatory organization, or if there is none, to the Commission;

2. Katzman cease and desist from committing or causing any violations and any future violation of Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15cl-2 thereunder, pursuant to Section 8A of the. Securities Act and Section 21C of the Exchange Act; and

3. Katzman shall, within 10 days of the entry of this order, pay a civil money penalty in the amount of $50,000.00 to the United States Treasury. Such payment shall be: (a) made by United States postal money order, certified check, bank cashier's check or bank money order; (b) made payable to the Securities and Exchange Commission; (c) hand delivered or mailed to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (d) submitted under cover letter that identifies Katzman as a Respondent in these proceedings and the file number of these proceedings, a copy of such cover letter and money order or check shall be sent to Richard P. Wessel, District Administrator, Securities end Exchange

Commission, Atlanta District Office, 3475 Lenox Road, N.E., Suite 1000, Atlanta, Georgia, 30326.

By the Commission.

Jonathan G. Katz Secretary

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[1] The findings herein are made pursuant to the Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

[2] Olde was formerly known as Olde & Co. and Financial Management & Research Corp.

[3] Olde recommended other securities as well, including bonds and mutual funds. The firm refers collectively to all the securities it recommends as "special products," which include stocks, investment grade fixed income securities, mutual funds, preferred stock, and unit investment trusts. During the relevant period, the firm referred to stocks followed by Olde's research department and published on a specific recommended list as "special venture" stocks. The majority of trades solicited by Olde RRs were stock trades.

[4] The sales credit assigned to a particular special venture stock came from the spread on that stock.

[5] In Olde parlance, "agency trades" are all trades not involving a special product.

[6] During the relevant period, an RR received 0% payout on monthly gross commissions of less than $5,000. Olde intended the RRs' monthly salaries to compensate them for servicing agency trades at this level.

[7] While RRs at other full-service firms are also compensated based on a percentage of the monthly gross they generate, trades in all securities generally contribute to that total monthly figure, even if the RRs' payout varies for different products. In contrast, Olde's compensation system, which emphasized the sale of special products in the calculation of monthly gross, heightened the potential conflict of interest between the RR and his or her customers.

[8] The securities industry practice of paying differential compensation by product or source of product recently has been the subject of extensive study by industry commentators.

[9] Olde viewed sales of these fixed income and mutual fund products as a way to accumulate more of a customer's assets.

[10] Those RRs who exceeded the quotas required to maintain commission privileges could achieve "superbroker" status within Olde and qualify for sales assistants. An RR could attain that title and receive one assistant by grossing $15,000 in special products for three consecutive months and averaging a minimum net gain in special venture moneyline market value of $400,000 per month. The superbroker qualified for a second assistant when he and his assistant reached $30,000 in monthly special products gross, and qualified for three and four assistants at $45,000 and $60,000 in monthly special products gross, respectively. New branch office managers were selected from among the ranks of the superbrokers. While the typical Olde branch office is small, elevation to management did not bring with it a reduction in the sales production expected of the new manager, whose sales production continued undiminished while he was expected to perform the added supervisory responsibilities of a branch office manager. Above the branch office manager level, district managers were also required to continue selling, as were the regional managers above them. The practice of requiring managers to meet the production quotas, rather than encouraging appropriate supervision, contributed to sales practice abuses in some cases.

[11] "Special venture moneyline market value" was the aggregate value of all special venture stock in the RR's customers' accounts.

[12] Because the sales credit for a particular special venture stock came from the spread, a larger credit would not increase the price a customer paid for that stock.

[13] Several of the objection responses from the script call for the RR to say, "the stock is going up" or "the stock is going higher." When one RR expressed concern to Snider that those responses amounted to improper guarantees of future performance, Snider responded, "You worry about yourself, let me worry about my company."

[14] The new account forms were sent to firm headquarters where they were reviewed by the compliance department for, among other things, approval for margin authorization.

[15] This is not to say that all special venture stocks are inherently bad investments or that they are unsuitable or speculative per se . Rather, it would rarely be suitable for a conservative, unsophisticated investor's portfolio to consist primarily of those special venture stocks that were more speculative issues. Nevertheless, this is precisely what happened to some of the customers' portfolios described above.

[16] This Order does not address facts and circumstances in other contexts not addressed in this Order in which disclosure of sources of profit to the broker-dealer or the salesperson may be required. This

Order only addresses the disclosure obligation of a broker-dealer or a salesperson who undertakes to explain how the firm or the salesperson makes money. In such circumstances, the explanation must be accurate, complete and without material omissions. See In the Matter of Carnation Company, 33 SCC Docket 1013, 1031 n.6, 1032 (July 8, 1985).

[17] Scienter may be established by a showing of knowing misconduct or severe recklessness. E.g., SCC v. Carriba Air, Inc., 681 F.2d 1318, 1324 (11th Cir. 1982); SEC v. Electronics Warehouse, Inc., 689 F. Supp. 53, 59 (D. Conn. 1988), aff'd, 891 F.2d 457 (2d Cir. 1989), cert. denied sub nom . Calvo v. SEC . 496 U.S. 942 (1990).

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No. 06-995

IN THE

Supreme Court of the United States

DANE INVESTMENTS, L.L.C.,

Petitioner,

v.

H & R BLOCK FINANCIAL ADVISORS, INC., FKA OLDE DISCOUNT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

STEPHEN H. KUPPERMAN
BARRASSO USDIN KUPPERMAN FREEMAN & SARVER, LLC
909 Poydras Street, Suite 1800
New Orleans, LA 70112
(504) 589-9700

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
PANKAJ VENUGOPAL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent

*Counsel of Record

February 20, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the court of appeals properly affirmed enforcement of an NASD arbitral award denying petitioner recovery.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent H&R Block Financial Advisors, Inc. is a wholly owned subsidiary of HRB Financial Corporation, which, in turn, is an indirect wholly-owned subsidiary of H&R Block, Inc., a publicly traded company.

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H & R BLOCK FINANCIAL ADVISORS, INC., FKA OLDE DISCOUNT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

Respondent H & R Block Financial Advisors, Inc. (formerly known as Olde Discount Corporation ("Olde"), and referred to herein as "H&R Block"), respectfully submits this opposition to the petition for a writ of certiorari in this case.

STATUTORY PROVISION INVOLVED

9 U.S.C. § 10(a) provides that a district court:

> [M]ay make an order vacating the award upon the application of any party to the arbitration –
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT AND BACKGROUND

After allegedly suffering losses following the post-September 11, 2001 market pullback, Petitioner Dane Investments, L.L.C. ("Dane") instituted arbitration proceedings with the National Association of Securities Dealers ("NASD") against Respondent H&R Block. Petitioner claimed that it had little control or knowledge of its investments and that H&R Block was liable for its losses. In response, H&R Block presented evidence that Dane had confirmed, repeatedly, that it was "fully aware" that it held "several concentrated positions" and that it "accepted all responsibility and risk with this type of investing." See App. to Br. of Def.-Appellee ("App."), Tab 16. After a three-day hearing, which included testimony by expert and fact witnesses, the arbitral panel rejected Petitioner's claims. Pet. App. 11a. Both the district court, *id.* at 4a-5a, and court of appeals, *id.* at 1a-2a, affirmed the NASD's arbitral award.

Further review is not warranted because this case implicates no conflict among the courts of appeals. Rather, the Fifth Circuit, in a short, unpublished decision, issued a narrow, fact-intensive holding that "there are no grounds for holding that the arbitration panel exceeded its authority or that it manifestly disregarded relevant law in making the award." Pet. App. 1a-2a. That holding does not warrant certiorari.

Recognizing as much, Dane attempts to advance a new argument in this Court. According to Dane, the Fifth Circuit

erred because it failed to adopt an entirely different non-statutory standard for vacating an arbitral award under the Federal Arbitration Act. Specifically, Dane asserts that an award should be set aside whenever a court subjectively feels that the arbitral award causes "unconscionable results." Pet. i. But Petitioner did not present this question to the Fifth Circuit, and that court's decision does not remotely purport to address or resolve that legal question. Accordingly, Petitioner's legal argument is not properly before this Court. See, *e.g.*, *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (question presented in petition but not "raised in the Court of Appeals is not properly before us"); R. Stern et al., *Supreme Court Practice* 421 (8th ed. 2002) (citing cases).

Further, even if the issue had been preserved, the decision below in no way implicates any conflict regarding the allegedly varying standards adopted by the courts of appeals. Instead, Petitioner is asking this Court to adopt a wholly distinct ground for vacating arbitration awards based on subjective "unconscionab[ility]." Pet. 10. There is no conflict as to this issue because *no* circuit court recognizes an "unconscionable results" exception to the binding force of an arbitration.

That is not surprising because Petitioner's proposal, if accepted, would be a license for federal courts to disregard the decisions of arbitral panels whenever they subjectively disagree with the panel's factfinding. Such a license would be flatly contrary to the purposes of the Federal Arbitration Act and this Court's well-established jurisprudence, which limit vacatur of an arbitration to the statutory grounds provided in 9 U.S.C. § 10, and narrow circumstances that evince a manifest disregard of established law. See *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995).

Lastly, this case would be an improper vehicle to consider Petitioner's proposal because even if an "unconscionable results" standard were appropriate – and it is not – that standard does not assist Petitioner in this case. Here, the arbitral panel was presented with compelling evidence that Petitioner con-

sidered itself an aggressive investor, that Petitioner knowingly traded on margin in high-tech securities, and that Petitioner directed every trade executed in his account. The arbitral panel was entitled to credit the letter by Petitioner's president in which he admitted: (i) "I am fully aware that I hold several concentrated positions and accept all responsibility and risks with this type of investing." (ii) "I also am aware that I carry a margin balance of about 1.6 million dollars," (iii) "[i]t is my intent to trade in this manner," and (iv) "I accept full responsibility for any results that may occur." App., Tab 16.

Petitioner's other questions presented – regarding the effect of an SEC consent decree on the arbitral proceedings and a complaint that the audio recording of the arbitration allegedly was, in part, inaudible, *see* Pet. ii, 15-18, 18-20 – also are fact-specific issues with no relevance beyond this litigation. These issues present no basis for review by this Court.

In sum, the petition should be denied.

COUNTERSTATEMENT OF THE FACTS

1. Petitioner Dane is a limited liability company, established by Gregory D. Wilt, for the sole purpose of trading securities. Pet. 4. Petitioner is not an amateur investor. Over the course of a 20-year period, Dane engaged in an average of 50 trades per year, with each trade averaging 2,000 shares. App., Tab 4.[1]

Originally, Petitioner held an account with Fidelity Investments, where, as Petitioner acknowledges, it made significant investments on margin. Pet. 4. In 1995, Petitioner moved its account from Fidelity to H&R Block, and this transfer included Petitioner's substantial margin debt. App., Tab 5.[2] On numerous occasions, Petitioner expressly acknowledged on

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[1] *See* R000040, R000034, R000044; *see also* App., Tab 15 (R001100, R001105, R001107, R001118); *id.* Tab 13 (R000051).

[2] *See* R000002 (margin debit balance of $503,957).

H&R Block's account application that Petitioner was an "aggressive" investor that was investing for "speculation." *Id.* Tab 11 at 4.[3] Petitioner informed H&R Block that it had a preference for investing in technology stocks. *Id.*[4]

Petitioner argues that it was not, "de facto," in control of its account because of Mr. Wilt's travel schedule, Pet. 4, but H&R Block demonstrated at the arbitration hearing that it provided Petitioner with monthly statements that reflected Petitioner's margin balances and interest charged, and also that it sent mailgrams to Petitioner for margin calls. App., Tabs 8, 9. H&R Block specifically advised Petitioner to reduce its margin balance, but it declined to do so. App., Tab 14.[5] The evidence showed that Dane was aware of its risky investment strategy:

> Let it be known that I am fully aware that I hold several concentrated positions and accept all responsibility and risks with this type of investing. I am also aware that I carry a margin balance of about 1.6 million dollars . . . .
>
> It is my intent to trade in this manner . . . .
>
> I accept full responsibility for any results that may occur.

Id. Tab 16. When the stock market declined both before and after the terrorist attacks of September 11, 2001, so too did the value of Dane's investments.

2. Disappointed with its losses, on December 20, 2002, Dane filed an arbitration demand with the NASD, seeking $4 million in damages from H&R Block. The arbitration panel conducted a three-day hearing in which both sides presented extensive evidence. In addition to documentary evidence supporting the above facts, the parties presented both fact and

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[3] *See also* App., Tab 4 (R000040; R000034; R000042).

[4] *See* R000040, R000034, R000044.

[5] *See* R001049, R001052.

expert witnesses. On March 11, 2004, at the close of the hearing, both parties acknowledged that they had been afforded a full and fair opportunity to be heard.

On April 2, 2004, the arbitration panel issued its ruling finding that H&R Block was not liable and dismissing Petitioner's claims. Pet. App. 11a. Based upon its consideration of the evidence presented, the arbitral panel found "no liability on the part of Respondent for alleged violations of the Rules of Fair Practice or Claimant's allegation of overconcentration in unsuitable investments." *Id.* In its award, the panel also ruled that "[a]ny and all claims for relief not specifically addressed herein are denied." *Id.*

3. Petitioner filed a complaint in the United States District Court for the Eastern District of Louisiana, seeking to vacate the arbitral award. Petitioner argued that the arbitration panel exceeded its authority under 9 U.S.C. § 10, because it allegedly failed to consider a claim for breach of fiduciary duty. See Pl.'s Mem. in Supp. of Mot. to Vacate Arbitration Award (Dkt. No. 6) at 4-7. Petitioner further contended that the panel manifestly disregarded the law because it allegedly failed to consider an SEC consent decree. *Id.* at 12-15. (In fact, the Fifth Circuit would rule that "the panel . . . admitted and considered" the SEC consent decree. Pet. App. 2a).

On November 17, 2004, the district court issued its initial order granting Petitioner's motion to vacate. Pet. App. 6a. The district court held: "I believe that the unconscionable results in this particular case demonstrate [H&R Block] breached its fiduciary duty to Plaintiff insofar as the margin interest and brokerage fees are concerned, and the Panel should not have dismissed those claims." Pet. App. 7a. H&R Block sought reconsideration, and, on March 20, 2005, after further briefing and a hearing about the standards of review in arbitration cases, the district court reconsidered its prior decision and affirmed the NASD award. *Id.* at 4a-5a.

The district court noted its personal "frustration" with the limited review that applies to arbitration awards. Pet. App. 5a. However, in language that Petitioner omits from its petition, see Pet. 7-8, 10-11, the court ruled that the arbitration panel's conclusions were "honestly arrived at with a sufficient minimum of due process." Pet. App. 5a. The court further concluded that "[t]he basic conditions for arbitration have, for all practical purposes, been met." *Id.*

4. On appeal to the Fifth Circuit, Petitioner revived old arguments and advanced new ones. See Br. of Pl.-Appellant at 1-2.[6] For example, Petitioner claimed that the mandatory arbitration agreement was "void *ab initio* due to unconscionability" because it was one-sided. *Id.* at 27-30. H&R Block responded by showing both that the arbitration agreement was binding on *both* Dane *and* H&R Block and that Petitioner could not challenge the arbitration clause as unconscionable because *Petitioner* had initiated the arbitration proceeding. See Br. of Def.-Appellee at 24. Petitioner filed no reply brief.

On October 19, 2006, the Fifth Circuit affirmed in an unpublished per curiam order. Pet. App. 1a-2a. The court was "satisfied that there are no grounds for holding that the arbitration panel exceeded its authority or that it manifestly disre-

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[6] Petitioner presented only the following issues to the Fifth Circuit:

I. Whether a cease and desist order issued by the Securities and Exchange Commission against appellee for the same acts used gainst appellant should be enforced.

II. Whether the arbitrators manifestly disregarded the law and/or impermissibly exceeded their powers in failing to address the issue of fiduciary duty owed by appellee to appellant . . . .

III. Whether the arbitrators manifestly disregarded the NASD Rules of Fair Practice in arriving at their decision.

IV. Whether appellee can assert Michigan law or any choice of law provision before the tribunals in this case . . . .

V. Whether appellant can challenge a mandatory arbitration provision as void ab initio due to unconscionability.

See Br. of Pl.-Appellant at 1-2 ("Statement of the Issues") (internal citations omitted).

garded relevant law in making the award." *Id.* at 1a-2a. The court also concluded that "Dane was an aware, sophisticated, and particularly aggressive investor." *Id.* at 2a. Finally, the court rejected the argument that the agreement to arbitrate was "unconscionable" because "Dane voluntarily brought its claims before the panel and it may not revisit that decision now, having received an adverse judgment." *Id.*

On January 17, 2007, Dane filed its petition with this Court.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONER'S "UNCONSCIONABLE RESULTS" THEORY WAS NOT PRESENTED TO THE FIFTH CIRCUIT AND DOES NOT OTHERWISE WARRANT REVIEW BY THIS COURT.

A. Review should be denied because Petitioner never argued to the Fifth Circuit that it should adopt an "unconscionable results" standard for vacating arbitral awards. Nor did the Fifth Circuit *sua sponte* rule on this novel proposal. Accordingly, this issue has been waived. See Stern, *supra* at 421 (citing cases).

The sole question Petitioner asked the Fifth Circuit to decide with respect to "unconscionability" was "[w]hether appellant can challenge a mandatory arbitration provision as void *ab initio* due to unconscionability." Br. of Pl.-Appellant at 1-2 (Statement of Issues). Petitioner alleged that the arbitration agreement was unfair because it compelled the arbitration of its grievances, while leaving Respondent with the option of turning to the federal courts. *Id.* at 27-30. The Fifth Circuit properly rejected that argument, explaining: "Dane's contention that the arbitration clause in its agreement with [H&R Block] is unconscionable and void is foreclosed because Dane voluntarily brought its claims before the panel

and it may not revisit that decision now, having received an adverse judgment." Pet. App. 2a.[7]

To be sure, Dane's Fifth Circuit brief does state, in passing, that "[c]harging $789,561.20 to convert over to Olde's . . . stocks or other recommended stocks is unconscionable." Br. of Pl.-Appellant at 21. That sentence was not enough to preserve the question that Petitioner raises here. Indeed, Petitioner's stray reference to the word "unconscionable" appears within Petitioner's argument in the Fifth Circuit that the arbitral panel "disregarded the law" reflected in the NASD's rules of conduct. *Id.* at 22-23. A complaint that the arbitral panel failed to follow the NASD's rules of conduct is not remotely the same as Dane's current claim that there should be "other non-statutory grounds, such as 'unconscionable results' acceptable as independent grounds for vacatur." Pet. i.

As a result, Petitioner cannot assign error to the Fifth Circuit for failing to decide an issue that Petitioner never presented. See, *e.g., Delta Airlines*, 450 U.S. at 362 (question presented in petition but "not raised in the Court of Appeals is not properly before us"); *Cooper Indus. Inc.* v. *Avaiall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) ("'We ordinarily do not decide in the first instance issues not decided below.'") (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001)); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."). Petitioner's waiver presents an insuperable bar to review in this Court.

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[7] In fact, the arbitration agreement was not one-sided. NASD rules obligate defendants to submit to arbitration "upon the demand of the customer." NASD R. 10301(a). The agreement here merely granted Respondent the reciprocal ability to compel arbitration. App., Tab 13 (R000052) ("The parties are waiving their right to seek remedies in court, including the right to jury trial.").

B. Nor does this case implicate a conflict among the federal courts of appeals as to whether "unconscionable results" is an appropriate standard for vacatur of an arbitral award.

Although Petitioner quotes at length a survey of vacatur law among the various courts of appeals, Pet. at 11-13 (quoting *Brabham* v. *A.G. Edwards & Sons, Inc.* 376 F.3d 377, 385 (5th Cir. 2004)), none of the cases cited has held, or even suggested, that an arbitral award can be set aside if the reviewing court merely concludes that it effects an "unconscionable result." In contrast, every circuit, including the Fifth Circuit in the decision below, accepts an arbitrator's "manifest disregard of the law" as a non-statutory ground for vacatur. Pet. App. 1a-2a. That accepted standard for vacatur was the principal basis that Petitioner advanced below, and the Fifth Circuit expressly and squarely rejected that argument. *Id.* ("[T]here are no grounds for holding that the arbitration panel exceeded its authority or that it manifestly disregarded relevant law in making the award.").

Likewise, Petitioner makes no argument that the decision below would have been different if the Fifth Circuit had applied the law of another circuit in assessing whether the arbitral award was in "manifest disregard" of the law. Nearly all of the courts of appeals share the identical test for determining whether there has been a manifest disregard of law.[8] Admittedly, the Seventh Circuit appears to have adopted a some-

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[8] *See Advest, Inc.* v. *McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990); *Greenberg* v. *Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000); *Dluhos* v. *Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003); *Patten* v. *Signator Ins. Agency, Inc.*, 441 F.3d 230, 236-37 (4th Cir.), *cert. denied*, 127 S. Ct. 434 (2006); *Dawahare* v. *Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); *McGrann* v. *First Albany Corp.*, 424 F.3d 743, 750-51 (8th Cir. 2005); *Carter* v. *Health Net of Cal., Inc.*, 374 F.3d 830, 837-38 (9th Cir. 2004) *Hollern* v. *Wachovia Sec., Inc.*, 458 F.3d 1169, 1176 (10th Cir. 2006); *B.L. Harbert Int'l, LLC* v. *Hercules Steel Co.*, 441 F.3d 905, 910 & n.2 (11th Cir. 2006); *Kurke* v. *Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 & n.3 (D.C. Cir. 2006)..

what different articulation. See *Wise* v. *Wachovia Sec., LLC*, 450 F.3d 265, 268 (7th Cir.) ("[W]e have confined [the manifest disregard of law ground] to cases in which arbitrators direct the parties to violate the law.") (internal quotation marks omitted), *cert. denied* 127 S. Ct. 582 (2006). But the Seventh Circuit's test is not implicated here because, if anything, it is even *more* restrictive than the Fifth Circuit's standard and therefore would have offered no comfort to Petitioner. *Id.* Moreover, no conflict between the Fifth and Seventh Circuits is implicated because Petitioner has not and cannot argue that the arbitral award has directed the "parties to violate the law." Cf. Stern, *supra* at 231 ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

Finally, although a few circuits have formulated additional non-statutory grounds for vacatur, such as when a panel's ruling is "arbitrary and capricious" or "violates public policy," those standards likewise are irrelevant because Petitioner never raised these grounds as a basis for vacatur in the Fifth Circuit. See, *e.g.*, *Lifecare Int'l, Inc.* v. *CD Med., Inc.*, 68 F.3d 429, 435 (11th Cir. 1995) (affirming arbitral award alleged to be "arbitrary and capricious"). Because Dane never advanced these arguments below, it cannot raise them here. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily, this Court does not decide questions not raised nor involved in the lower court."). Indeed, Petitioner has not and cannot make any argument that the decision below would have been different if the Tenth Circuit's "arbitrary and capricious" ground for vacatur had applied to his case. *See Lifecare Int'l Inc.*, 68 F.3d at 435 ("arbitrary and capricious" test is "a very difficult standard for the party contesting the arbitration award to overcome" because it permits vacatur "only if there is no ground whatsoever for the Panel's decision").[9]

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[9] Perhaps recognizing that the case law does not support its proposed standard, Dane makes a fall-back argument: that "unconscionable results" may be a species of "manifest disregard of the law." Pet. 15. But Dane

C. The fact that no court of appeals has adopted petitioner's "unconscionable results" test is not surprising. This Court has consistently held that the standard for reviewing arbitration awards is exceedingly narrow. In *First Options*, this Court noted that "where the party has agreed to arbitrate," that party has all but "relinquished" the "right to a court's decision about the merits of its dispute." 514 U.S. at 942; cf. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 614, 628 (1985) ("Having made the bargain to arbitrate, the party should be held to it").

Although a party to an arbitration "can ask a court to review the arbitrator's decision," a "court will set that decision aside only in very unusual circumstances." *First Options*, 514 U.S. at 942. Under 9 U.S.C. § 10, an award can be vacated only if it is "procured by corruption, fraud, or undue means" or if the "arbitrator exceeded his powers." *First Options*, 514 U.S. at 942. Likewise, "parties are bound by [an] arbitrator's decision [that is] not in 'manifest disregard' of the law." *Id.* (quoting *Wilko* v. *Swan*, 346 U.S. 427, 436-37 (1953)).

In stark contrast, the amorphous "unconscionable results" test proposed by Petitioner would grant reviewing courts *carte blanche* to second-guess the arbitral panel's factual determinations and thus supplant the parties' contractually chosen means of resolving disputes. That approach cannot be squared with the FAA's intent and this Court's holdings that judicial scrutiny of arbitral awards is necessarily and exceedingly limited. See *id.*; *Eastern Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 62 (2000) ("as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact

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offers no reason to supports its assertion. A court's subjective conclusion that an arbitral award effects an "unconscionable result" does not depend upon whether (i) the governing law has been ignored or (ii) the arbitral panel engaged in arbitrary and capricious or irrational factfinding or legal reasoning.

that 'a court is convinced he committed a serious error does not suffice to overturn his decision.'") (alteration in original) (quoting *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 38 (1987)).

D. Finally, the purported "conflict" that Dane advanced is irrelevant to what was, in essence, a factual dispute resolved by the arbitral panel against Petitioner. Indeed, Petitioner's "unconscionable result" standard, which is never defined, is tied inextricably to the facts of this case. Pet. 10 (arguing that "the actions of the respondent, in charging almost $800,000 to lose almost all of petitioner's assets, were unconscionable"). But there is nothing unconscionable in the arbitration panel's finding that an investment firm was not liable to an "aware, sophisticated, and particularly aggressive" investor, Pet. App. 2a, whose losses were incurred while investing on margin in risky technology stocks in the midst of a stock market decline. Nothing in the law makes an investment firm a guarantor for the losses incurred by its customers.

II. THE REMAINING QUESTIONS PRESENTED BY PETITIONER DO NOT WARRANT REVIEW.

A. Petitioner also contends that the arbitration panel should have admitted and considered an SEC consent decree that it claims was related to this dispute. Pet. i-ii, 15-18. This case-specific argument is particularly puzzling because the Fifth Circuit concluded that "the panel . . . admitted and considered it." Pet. App. 2a.

Nor can Petitioner obtain review of whether the arbitral panel should have given the SEC enforcement decree controlling weight. See Pet. 18 ("The petitioner asked the arbitration panel to treat the consent decree as a legal finding of wrongdoing"). Under this Court's established doctrine on vacatur, Petitioner cannot set aside the arbitration's findings simply because it "believes its own interpretation . . . would be the better one." *W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 764 (1983); see *United Paperworkers Int'l Union* v.

Misco, Inc., 484 U.S. 29, 38 (1987). Further, as the court below explained, "the [arbitral] panel probably should not have even admitted the consent order into evidence (it certainly was not 'enforceable' by the panel)." Pet. App. 2a. Finally, any purported error regarding the weight given to the SEC consent decree in this NASD arbitration is a fact-intensive issue whose resolution will have no impact beyond the parties to this dispute. Accordingly, this issue does not warrant further review by this Court.

B. Dane argues that because the tape recording of the proceedings before the arbitration panel allegedly was inaudible, Petitioner was denied "his constitutional rights to due process and trial by jury." Pet. 18 (capitalization omitted). Petitioner does not dispute that the arbitral proceedings were audiotaped in accordance with the NASD's Rules. See *id.* at 2 ("'A verbatim record by stenographic reporter or a tape, digital, or other recording of all arbitration hearings shall be kept'") (quoting NASD Uniform Code of Arbitration 10326). Petitioner insists, however, that the entire arbitration must be vacated because, even though an audiotape of the proceedings was taken, when Petitioner tried to have the tapes transcribed, "the court reporter could not do so." *Id.* at 19.

Petitioner's argument provides no basis for granting review. Tellingly, Petitioner does not suggest how the availability of that transcript would have altered the district court's review. Cf. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."). Nor does Petitioner explain how the NASD, when it acts in the limited capacity of administering arbitration proceedings, can be a state actor subject to the Constitution. See, *e.g.*, *D'Alessio* v. *SEC*, 380 F.3d 112, 120 n.12 (2d Cir. 2004) ("The National Association of Securities Dealers ('NASD') . . . is not a state actor subject to due process requirements."). Finally, this argument, like others in the Petition, was neither raised before nor decided by the Fifth Circuit and thus is waived.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

STEPHEN H. KUPPERMAN
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, LLC
909 Poydras Street, Suite 1800
New Orleans, LA 70112
(504) 589-9700

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
PANKAJ VENUGOPAL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent

*Counsel of Record

February 20, 2007

(3)

No. 06-995

FILED
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OFFICE OF THE
SUPREME

In The

Supreme Court of the United States

DANE INVESTMENTS, L.L.C.,

Petitioner,

v.

H & R BLOCK FINANCIAL ADVISORS, INC.,
formerly known as Olde Discount Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

JOSEPH F. MYERS
514 E. Lockwood Street
Covington, Louisiana 70433
Telephone: 985-809-2140
Facsimile: 985-809-0272

Counsel for Dane Investments, L.L.C.

COCKLE LAW BRIEF PRINTING CO (800) 225 6964
OR CALL COLLECT (402) 342-2831

REPLY BRIEF FOR PETITIONER

Petitioner Dane Investments, L.L.C. respectfully submits this reply to the respondent's brief in opposition in this case.

The respondent, H & R Block Financial Advisors, Inc., formerly known as Olde Discount Corporation, raised a number of new points in its brief in opposition:

1. Respondent alleged "Petitioner's 'unconscionable results' theory was not presented to the Fifth Circuit." (Br.Opp. 8). Petitioner did present this theory, both in the petitioner's appellant brief (App. 2) and in oral argument before the Fifth Circuit.

2. Respondent alleged that the conflict among the circuit courts as to what standards for *vacatur* of an arbitral award are acceptable was not presented to the Fifth Circuit on appeal and, therefore, cannot be raised here (Br.Opp. 10-11). The conflict among the circuits was indeed raised in the petitioner's brief to (App. 2) and in oral argument before the Fifth Circuit but can only be decided by this Court. Therefore, it is properly brought before this Court.

3. Respondent contends that the arbitration panel considered the SEC consent decree because the Fifth Circuit said that the panel did so (Br.Opp. 13). Since there was no useable record made of the arbitration proceeding, the Fifth Circuit could not have known whether the panel considered it or not. In fact, the results of the arbitration proceedings indicate that the panel did not consider it. This issue does warrant further review by this Court because it dealt with all clients of the respondent at the same time petitioner was a client and shows that respondent was

violating securities laws in its dealings with its clients. (Pet. App. 18-72)

4. The issue of the lack of an audible tape recording of the arbitration proceedings was raised before the Fifth Circuit in the petitioner's appellant brief (App. 1) and in oral argument and thus is not waived. The tapes were inaudible in their entirety (App. 3-5) and, according to industry dispute practitioners, this result is a frequent occurrence.

5. The respondent argues "the purported 'conflict' that Dane advanced is irrelevant to what was, in essence, a factual dispute resolved by the arbitral panel against Petitioner" (Br.Opp. 13). Since there was no audible recording of the arbitral proceedings and no written explanation for the award or lack thereof, the petitioner and the courts do not know what facts and what law were considered. One of the difficulties on pressing any of the standards for *vacatur* arguments, including "manifest disregard," is that judicial application of those standards may be stymied by the lack of written explanation for an award. Arbitrators are not required to explain the basis for their decisions, and normally do not do so. *O.R. Sec. v. Professional Planning Assoc., Inc.*, 857 F.2d 742 (11th Cir. 1988). Thus, a reviewing court is in the unenviable position of having to assess "manifest disregard" by trying to infer from the facts of the case whether a decision reflects that the arbitrators appreciated the existence of a clearly governing legal principle, and, if so, whether they decided to ignore it. *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (2d Cir. 1997). The absence of explanation can reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998); *Campbell v. Cantor Fitzgerald & Co.*,

21 F. Supp. 2d 341, 345 (S.D.N.Y. 1998) (" . . . the court can infer from the absence of an explanation that the panel did not have a reasonable basis for its explanation . . . ").

6. Respondent's footnote 9 stating that "Perhaps recognizing that the case law does not support its proposed standard, Dane makes a fall-back argument: that 'unconscionable results' may be a species of 'manifest disregard of the law' . . . " (Br.Opp. 11) is erroneous. Petitioner believes the case law does support its proposed standard and was merely suggesting that the varying non-statutory standards may all be ways of applying or expressing either the statutory standards or the non-statutory standard of "manifest disregard of the law," especially since the concept of "manifest disregard of the law" has not been defined by this Court (Pet. 14-15).

7. Respondent stated in a number of places that petitioner opted for and initiated arbitration. Petitioner had no choice. Arbitration has been made mandatory by the securities brokerage industry and by this Court since the Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In fact, arbitration is not only mandatory, but must be held in a non-neutral forum (at least one of the three arbitrators must be from the securities industry), and is conducted and managed by an industry regulatory authority. Respondent also alleged that petitioner freely admitted that the hearing was fair. This is a question that is asked after every hearing and claimants are presented with a dilemma. If they answer no, will the arbitrators hold that against them when they make their decision? If they answer yes, and the claimant wants to appeal, their affirmation will be used to discredit them. It is an unfair question and should neither be asked nor answered.

8. There are a number of disagreements over the facts. The petitioner acknowledges that factual disagreements can and should be resolved if and when the writ is granted. However, the petitioner believes the statement made by respondent on page 4 of respondent's brief wherein respondent quoted from petitioner's brief and alleged that Dane Investments L.L.C. was established for the sole and primary purpose of trading securities, is not only a misquote but is also misleading and needs to be addressed. The respondent omitted the sentence from pages 3 and 4 of the petitioner's brief that preceded the quoted sentence, wherein the petitioner said "Gregory D. Wilt formed the petitioner, Dane Investments L.L.C., to hold his condominium rental income investments." The respondent only quoted the second sentence that said " . . . he also had his securities investments held by petitioner." (Pet. 4) Also, the petitioner wants to make it clear that Gregory Wilt was not a sophisticated investor and, previous to his dealings with respondent, had only bought stock, and conservative stock at that, and through coercion signed the "happiness letter" the respondent dictated to him.

CONCLUSION

The issues raised in this reply brief and in the petition are of national importance and affect everyone who has a securities claim or dispute. To ensure the integrity of the present arbitration process for securities dispute resolution and to ensure that investors accept the present system as fair and impartial and to resolve conflicts among the circuits, the following questions which were raised in the petition should be addressed and answered:

a. If a U.S. citizen is to forfeit his right to trial by jury, which standards among the many standards for *vacatur* used in the varied circuits are acceptable and how are they defined?

b. If the Securities and Exchange Commission ("SEC") is charged with overseeing the securities arbitration process, then how are arbitrators to treat SEC consent and cease and desist decrees in arbitration proceedings?

c. If there are Self Regulatory Organization regulations requiring a verbatim record be made of arbitration proceedings so that there can be a record for judicial review, does the failure to make such a record deny a claimant his constitutional rights to due process and trial by jury or its equivalent?

For the foregoing reasons, and for those in the petition, the petition for writ of certiorari should be granted. In the alternative, the petition should be granted, the judgment of the Court of Appeals vacated, and the case remanded for further consideration.

Respectfully submitted,

JOSEPH F. MYERS
514 E. Lockwood Street
Covington, Louisiana 70433
Telephone: 985-809-2140
Facsimile: 985-809-0272

Counsel for Dane Investments, L.L.C.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 05-30414

DANE INVESTMENTS LLC
Plaintiff-Appellant

VERSUS

H & R BLOCK FINANCIAL ADVISORS, INC.
formerly known as Olde Discount Corporation
Defendant-Appellee

On Appeal from the United States
District Court for the Eastern District of Louisiana
Honorable Peter Beer, Judge

ORIGINAL BRIEF OF PLAINTIFF-APPELLANT,
DANE INVESTMENTS, L.L.C.

JAMES E. STOVALL, L.L.C.
JAMES E. STOVALL, #12515
514 E. Lockwood
Covington, Louisiana 70433
Telephone: (985) 809-2140
Attorney for Plaintiff-Appellant,
Dane Investments, L.L.C.

* * *

[6] The arbitrators did not properly record the hearing so, unfortunately, there is no transcript of the hearing, although attempts were made to transcribe the tapes.

* * *

[7] The District Court felt that the actions of Olde/H & R Block, in charging almost $800,000.00 to lose almost all of the appellant's assets, was unconscionable. However, on rehearing, the District Court felt compelled to place form over substance and reversed its prior judgment vacating the arbitration award.

* * *

[9] **B. Judicial Grounds for Vacatur**

The federal courts have utilized several non-statutory grounds for vacating arbitration awards.

* * *

May 25, 2004

James E. Stovall, L.L.C.
313 Lee Lane
Covington, Louisiana 70433

Dear JoAnn:

As per our telephone conversation today, I am writing to update you on the progress of the tape transcription of the Dane Investments v. H&R Block tapes.

When attempting to transcribe Tape 1, I found the tape to be blank. The tape does have a sticker which reads "No Audio." Tapes 2 through 6 are of poor recording quality. I am able to hear the questioning party, but the witness is, for the most part, inaudible.

Please let me know how to proceed with this transcription job.

Thank you,

Stacey McConnell

JAMES E. STOVALL, L.L.C.
Attorney at Law

514 E. LOCKWOOD STREET, COVINGTON, LOUISIANA 70433
TELEPHONE: (985) 809-2140 FAX: (985) 809-0272

3350 Ridgelake Drive, Suite 200
Metairie, Louisiana 70002

New Orleans Line:
(504) 830-2929

Email:
Stovylaw@bellsouth.net

May 26, 2004

Via Facsimile – 1-561-447-4938

Ms. Janet Hart
NASD Dispute Resolution
Boca Center
5200 Town Center Circle
Tower 1 – Suite 200
Boca Raton, Florida 33486-1012

Re: NASD Dispute Resolution Arbitration Number 02-07739
Dane Investments, L.L.C. v. H&R Block Financial Advisors, Inc. Formerly Olde Discount Corporation

Dear Janet:

As you are aware, we had requested from you and received six (6) tapes from the above-referenced arbitration. However, when the transcriptionist attempted to transcribe the tapes provided she faxed the attached letter to me regarding their condition. Please contact me immediately upon receipt of this correspondence to advise if anything can be done to secure tapes that are audible.

Additionally, please note that my address has changed from 313 Lee Lane, Covington, Louisiana 70433 to 514 E.

Lockwood Street, Covington, Louisiana 70433. The telephone number and fax number are unchanged.

If you need anything further in order to comply with this request, please do not hesitate to contact me. Thank you for your attention.

Sincerely,

/s/ James E. Stovall
James E. Stovall

JES/jpd
Attachment